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ABSTRACT

This book is a primer on board-member liability issues and is intended for both board members and school attorneys. The first chapter, "The Legal System," examines federal sources of legal authority, state and local sources of legal authority, and federal and state judicial structures. Liability under state tort law is the subject of chapter 2, which includes sections on basic tort principles, personal liability of school board members, liability for injury, sexual abuse, and other concerns. Chapter 3 discusses the Section 1983 claim that prohibits the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. The chapter describes basic elements of the law, remedies for successful claimants, common Section 1983 claims, and "nonconstitutional" Section 1983 claims. Chapter 4 outlines some of the legal defenses against liability, including procedural defenses, substantive defenses, and statutory or common-law defenses. The last chapter, "Minimizing Liability," discusses the need to develop a coherent plan that lessens the risk of a district being sued. These prevention measures include adopting and implementing sound policies, securing legal advice on policies, training everyone in the district, investigating complaints against the district, securing appropriate insurance, and formulating a course of action should the school board become the target of a suit. (RJM)

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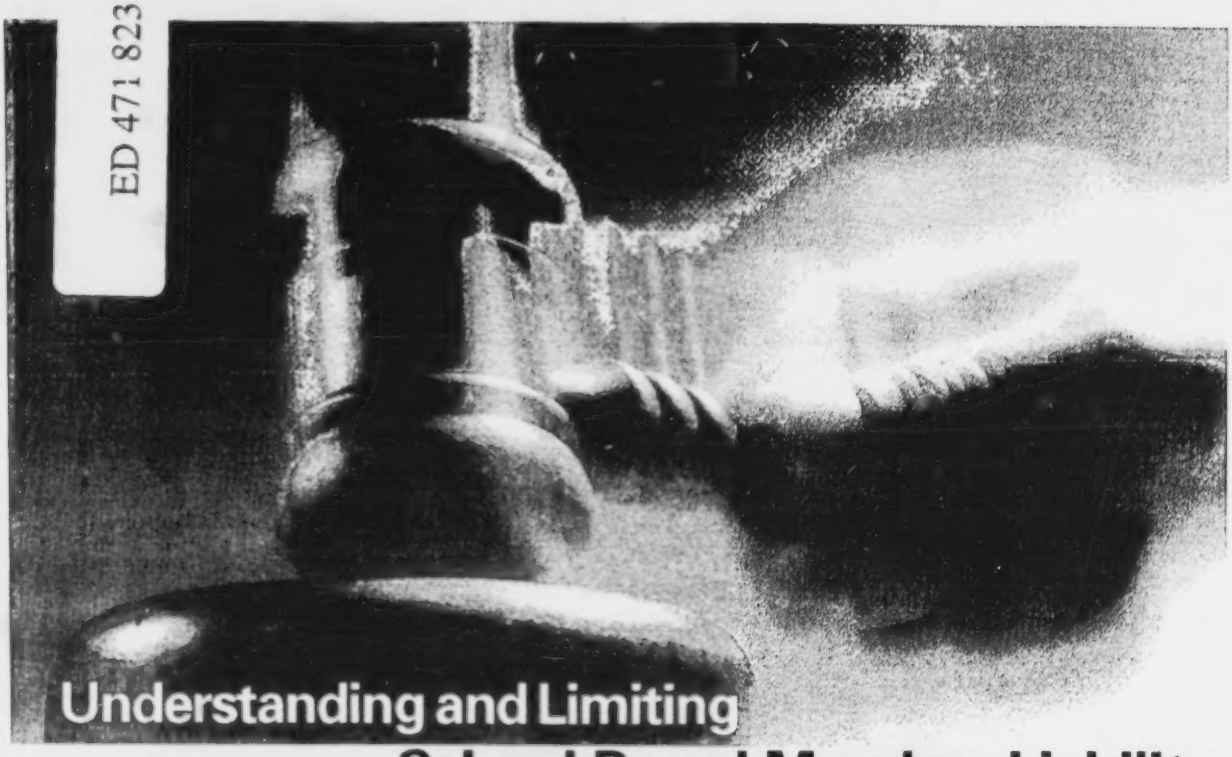

Understanding and Limiting School Board Member Liability

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An NSBA Council of School Attorneys Publication

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Understanding and Limiting School Board Member Liability

Terry Hodges
Stephanie Jones
Mary L. Purvis
David B. Rubin
Doralee Thrasher
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About the NSBA Council of School Attorneys . . . .

Leadership in legal advocacy for public schools has been the overriding mission of the NSBA Council of School Attorneys throughout its celebrated history. The Council was formed in 1967 to provide information and practical assistance to attorneys who represent public school districts. It is the only national advocacy organization composed exclusively of attorneys representing public K-12 school boards. It offers continuing legal education, specialized publications, a forum for exchange of information and it supports the legal advocacy efforts of the National School Boards Association. For information on membership, contact your state school boards association or the NSBA Council of School Attorneys.

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FOREWORD

[A] reasonably competent public official should know the law governing his conduct.

Harlow v. Fitzgerald, 457 U.S. 818 (1982)

It is with this charge from the U.S. Supreme Court in mind that the NSBA Council of School Attorneys presents this fourth edition of a book originally published in 1981. Like those earlier publications, this new version serves as a primer on board member liability issues for both board members and school attorneys. To give a broader view of the potential legal hazards board members face, it expands beyond the original focus on liability under Section 1983 for civil rights violations. It also explains how our legal system works, describes common areas of liability under state tort law, reviews possible legal defenses against liability and offers practical advice on how to avoid or minimize liability. Its approach is general and concentrates on the claims most frequently brought against school boards and their members. It does not discuss potential liability of board members under specific state statutes or under federal civil rights statutes such as Title VII of the 1964 Civil Rights Act. Each chapter is followed by a review checklist to help readers recall key information.

The Council offers this revised publication with the hope that it will assist board members and their counsel to understand their legal responsibilities so that they may choose their course of conduct wisely with minimal exposure to legal liability. The information, however, is not intended as legal advice. The reader is urged to consult a competent professional for advice on specific issues.

The Council extends its appreciation to the experts who contributed their time, knowledge and experience to making this book a practical and useful resource. The Council also thanks the NSBA staff members for their efforts in preparing this publication.

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CHAPTER 1

The Legal System

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National School Boards Association
Alexandria, Virginia

INTRODUCTION

To avoid liability, school boards and their members must understand the source of the legal responsibilities and restrictions that govern the operation of public schools. These responsibilities and restrictions are imposed by a complex legal structure built on the concept of federalism. There are three levels of government–federal, state, and local–and four types of law–constitutional, statutory, administrative and judicial–within each level. School districts must comply with the legal authority and precedents established at each level.

TABLE 1 Sources of Legal Authority

FEDERAL	STATE	LOCAL DISTRICT
Constitution	Constitution	
Statutes	Statutes	Board Policies
U.S. Dep't of Education	State Dep't of Education	Administrative Rules
Federal Courts	State Courts	Board as Hearing Body

FEDERAL SOURCES OF LEGAL AUTHORITY

Constitution

A constitution is the original agreement under which a group of people forms a government. It establishes the rules by which the government will operate by setting forth its responsibilities and

limitations. The United States Constitution is the supreme law of the land with which all other forms of legal authority must comply. The U.S. Constitution establishes three branches of federal government and defines the powers exercised by each. The amendments to the Constitution place additional limitations on governmental authority. The amendments of greatest concern to public schools are:

First Amendment:	Establishment of religion Free exercise of religion Freedom of speech Freedom of the press Freedom of association Right of assembly
Fourth Amendment:	Freedom from unreasonable search and seizure
Fifth Amendment:	Freedom from self-incrimination
Eighth Amendment:	Ban on cruel and unusual punishments
Tenth Amendment:	Reserved powers
Eleventh Amendment:	State immunity
Thirteenth Amendment:	Ban on involuntary servitude
Fourteenth Amendment:	Due process/Equal protection

Statutes

Statutes are provisions of law enacted by a legislative body; they represent the current will of the people. Article I of the U.S. Constitution outlines the authority of the U.S. Congress. It does not include the power to control and regulate public education. Under the Tenth Amendment, any authority not given specifically to the federal government is reserved to the states. Thus, the federal government has no authority to regulate education directly; that belongs to the states.

Despite this apparent limitation, Congress does exercise considerable power over public education through an indirect route—its power to spend for the general welfare. Congress uses this power in two ways. First, it grants funds to states and local school districts based on their adoption and implementation of plans, programs, policies or procedures that serve certain purposes.

TABLE 2 Funding Statutes

FEDERAL STATUTE	PURPOSE	CITATION
Title IV of the Civil Rights Act	Provides funds for technical assistance and training re: race, national origin, and sex equity issues	42 U.S.C. 2000c
Carl Perkins Vocational Education Act	Provides funds for quality vocational education programs with attention to special needs populations	20 U.S.C. 2301
Title I of No Child Left Behind Act of 2001	Provides funds to improve the academic achievement of disadvantaged students	20 U.S.C. 6301 et seq.
Title II of No Child Left Behind Act of 2001	Provides funds to improve the preparation, training and recruiting of high quality teachers and principals	20 U.S.C. 6601 et seq.
Title III of No Child Left Behind Act of 2001	Provides for language instruction for students who have limited English proficiency	20 U.S.C. 6801 et seq.
Individuals with Disabilities Education Act (IDEA)	Ensures appropriate special education and related services	20 U.S.C. 1400 et seq.
Child Abuse Reporting and Prevention Act	Ensures mandatory reporting of suspected child abuse and neglect	42 U.S.C. 5101 et seq.

Second, Congress requires states and local districts that receive federal funds to comply with various conditions that serve other federal policy goals, such as protection of civil rights and individual privacy. States or districts that violate these conditions risk losing their federal funding.

TABLE 3 Non-discrimination and Privacy Statutes for Federal Fund Recipients

FEDERAL STATUTE	PURPOSE	CITATION
Age Discrimination Act	Prohibits age discrimination	42 U.S.C. 6101
Section 504 of the Rehabilitation Act	Prohibits disability discrimination	29 U.S.C. 794
Title VI of 1964 Civil Rights Act	Prohibits discrimination on the basis of race, color or national origin	20 U.S.C. 2000d
Title IX of the 1972 Education Amendments	Prohibits sex discrimination in educational institutions	20 U.S.C. 1681
Family Educational Rights and Privacy Act	Protects student privacy in school records	20 U.S.C. 1232g
Equal Access Act	Prohibits content-based discrimination for access to high school forums	20 U.S.C. 4071

Congress also has the power to regulate commerce. Under this power, Congress has enacted laws that regulate the work force. As public employers, school districts are subject to many of these laws. For example, the Fair Labor Standards Act, 29 U.S.C. 206, regulates the wages and working conditions of most Americans. The Age Discrimination in Employment Act, 29 U.S.C. 621-634, prohibits employment discrimination on the basis of age for those over 40.

Finally, Congress has the obligation to eradicate discrimination, i.e., implement the Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments). Such implementation is

contained in statutes like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d, designed to eliminate racial discrimination in employment.

TABLE 4 Other Civil Rights Statutes

FEDERAL STATUTE	PURPOSE	CITATION
Title VII of 1964 Civil Rights Act	Prohibits discrimination in employment on the basis of sex, race, national origin, or religion	42 U.S.C. 2000e
Americans with Disabilities Act	Prohibits discrimination on the basis of disability	42 U.S.C. 12101 et seq.
Voting Rights Act	Prohibits discrimination on the basis of race in voting procedures	42 U.S.C. 1971 et seq.

Administrative Rules and Regulations

The federal government also adopts administrative rules and regulations that affect education. The U.S. Department of Education is the primary federal agency that issues regulations to implement federal education statutes and monitors districts for compliance. Its ultimate power is the authority to withhold federal funds from institutions found to be in noncompliance. Courts grant a good deal of discretion to the administrative agencies charged with implementing and monitoring federal statutes. Thus, the Department of Education has a significant amount of control over public education across the nation.

STATE AND LOCAL SOURCES OF LEGAL AUTHORITY

Each of the 50 states has a constitutional provision mandating a system of education. The language varies—some say that the legislature must provide for a "uniform" system of education; others stipulate a "free" system of education or a "thorough and efficient" form of education. Under these mandates, state legislatures have broad plenary powers to directly control public education.

State legislatures have used that authority differently from state to state and from time to time. The legislature may choose to keep for itself all of the authority to regulate education. In this situation, the legislature directs such items as curriculum, graduation standards, and teacher certification through statutes. Alternatively, the legislature can delegate its authority to regulate to an administrative agency, such as the state department of education or state department of public instruction. If given broad authority, the state department of education may then delegate some of this authority to school districts. Finally, the legislature may delegate its authority directly to the local school districts upon their creation. Within the scope of their delegated powers, local school boards generally have the power to adopt policies and administrative rules and to act as a hearing body.

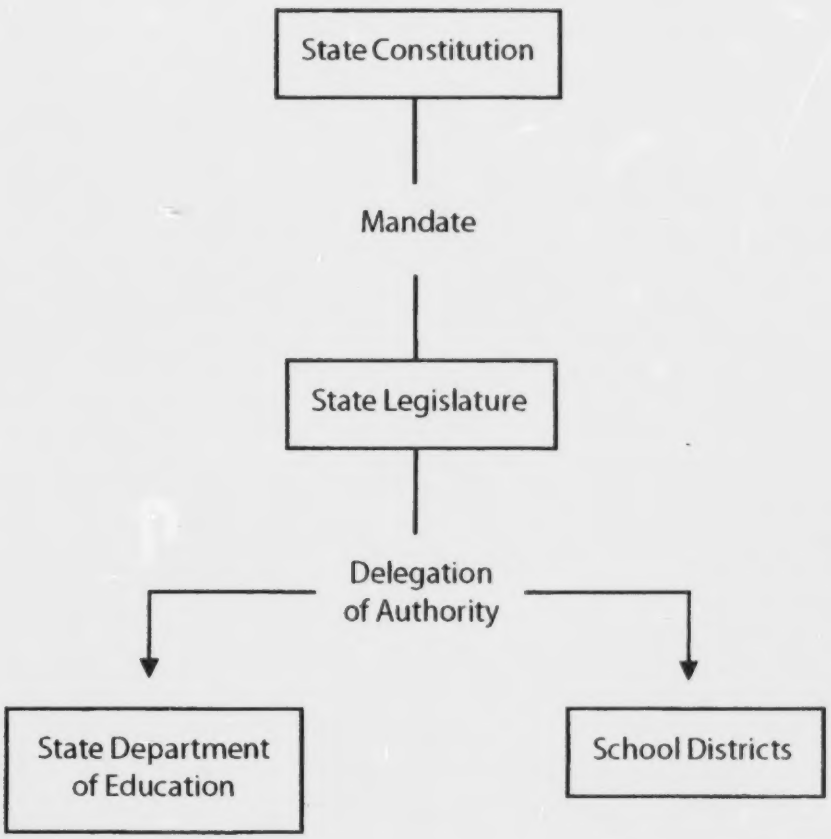

FIGURE 1 Delegation of State Authority

FEDERAL AND STATE JUDICIAL STRUCTURES

Courts basically have three functions: (1) settle controversies between parties, (2) construe or interpret legislation, and (3) determine the constitutionality of governmental actions. In carrying out these functions, the courts must decide the dispute in front of them—they cannot legislate. Additionally, they must make their decisions based on the general rules covering similar disputes. Those rules come from constitutions, statutes, administrative regulations, or previous judicial decisions (also known as case law).

In applying legal authority to the facts in front of them, courts must abide by the interpretations of law made by courts superior to them. Figure 2 illustrates the federal and state court structure. The federal system and most state judicial systems have three levels of courts. At the bottom level are trial courts where lawsuits typically begin. There, the facts are determined and the law is applied to those facts, leading to a result. If a party is not satisfied with the result, it can appeal to the next higher court to review the decision. Generally, appellate courts do not make independent determinations of fact, but rather determine if the law was correctly developed and applied to the facts. In most states and at the federal level, a second level of appeal—usually known as the supreme court—exists; many supreme courts have the discretion to refuse to review a case. When that happens, the decision of the lower court stands.

The appellate structure sets forth the superior/subordinate relationship and determines by which interpretations a lower court is bound. In essence, a court must apply those interpretations set forth by courts above it in the appellate chain. Thus, state appeals courts and state trial courts must abide by the decisions of that state's supreme court. Decisions of a state court have legally binding effect only in their own state, although they may influence courts outside the state.

The federal and state courts are linked only at the level of the United States Supreme Court, so that all courts in the nation are bound by U.S. Supreme Court decisions. State courts are not bound by other federal court decisions. Equally true, federal district courts (trial courts) are not bound by the opinions of federal appeals courts outside their circuit. (See Figure 3 on page 9 for a map of the federal judicial circuits.)

This pattern of binding precedent helps to explain the inconsistent rulings and interpretations on the same or similar issues across the nation. Differences in court decisions may emerge as well because the judicial system is a highly politicized institution that reflects the diverse political ideologies and values found in society at large.

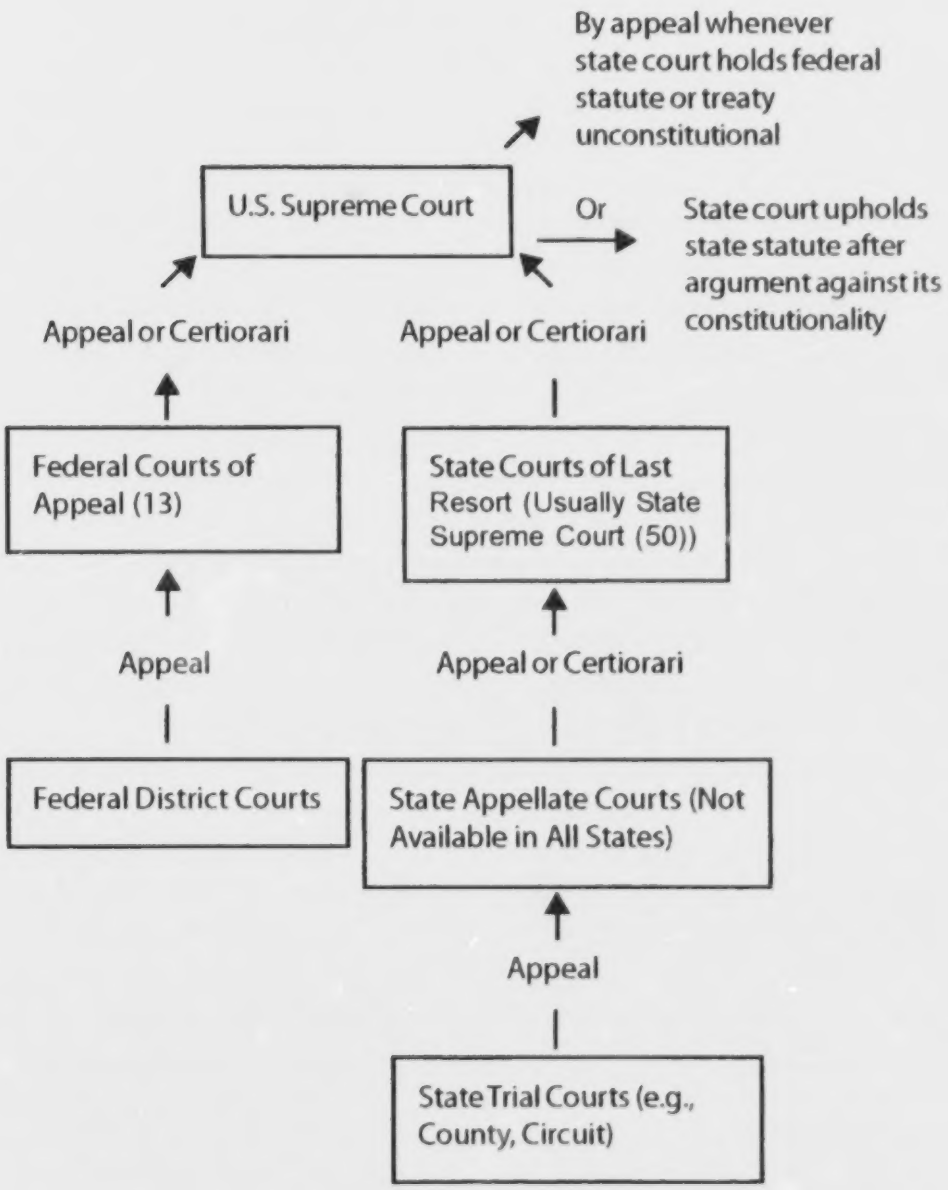
By appeal whenever state court holds federal statute or treaty unconstitutional
U.S. Supreme Court
Or
State court upholds state statute after argument against its constitutionality
Appeal or Certiorari
Appeal or Certiorari
Federal Courts of Appeal (13)
State Courts of Last Resort (Usually State Supreme Court (50))
Appeal
Appeal or Certiorari
Federal District Courts
State Appellate Courts (Not Available in All States)
Appeal
State Trial Courts (e.g., County, Circuit)

FIGURE 2 Federal and State Court Structure

FIGURE 3 Federal Court Circuits

THINGS TO KNOW ABOUT OUR LEGAL SYSTEM

- ✓ Board members' legal responsibilities and restrictions derive from federal, state and local law.
- ✓ The U.S. Constitution is the supreme law of the land. Board members must understand and comply with it, particularly several key amendments (1st, 4th, 5th, 8th, 10th, 11th, 13th and 14th).
- ✓ By accepting federal education funds, school boards agree to comply with programmatic conditions and certain federal civil rights laws.
- ✓ As public employers, school boards must adhere to certain federal laws regulating the work force.
- ✓ School boards exercise only that authority delegated to them by the state.
- ✓ School boards may generally sue and be sued in state or federal court depending on the claim.
- ✓ In deciding the cases before them, courts must follow past case law made by courts superior to them in the state or federal court system.
- ✓ Decisions by the U.S. Supreme Court apply to everyone. Other court decisions apply only to those within their jurisdiction.

CHAPTER 2

Liability Under State Tort Law

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This chapter is a primer on the broad issues of liability that local school boards and school board members may face under state tort law. It is not an exhaustive analysis, but rather a summary that paints a broad brush of common liability issues. Keep in mind that these issues may vary from state to state and may change over time.

BASIC TORT PRINCIPLES

A tort is a civil wrong, a violation of a duty, which causes harm. In our legal system, an individual who is injured by a breach of duty can sue the wrongdoer to collect compensation for that injury. There are basically two types of civil wrongs: (1) intentional torts, including trespass, assault, battery and defamation; and (2) unintentional torts, including negligence and strict liability. Strict liability is when someone is held liable, even though they are not at fault. It is often used in circumstances involving an ultra hazardous activity and is a rarity in the school context. The law also recognizes constitutional torts which occur when a government agent has violated an individual's constitutional rights. These are discussed in Chapter 3.

The most common kind of tort for which school boards and their members are sued is negligence. Negligence is the failure to exercise due care or reasonably fulfill one's duty of care, which results in injury or loss to another person. Either the failure to act (omission) or the commission of an improper act can be negligence.

Elements of Negligence

To bring a negligence claim against a school board or its members, the plaintiff must show four things:

✓ The defendant had a duty of care to protect the plaintiff from foreseeable risks;

✓ The duty was breached by the failure to exercise an appropriate standard of care;

✓ There was a causal connection between the negligent conduct and the resulting injury; and

✓ An actual injury resulted.

- **Duty**

The law recognizes a duty of care that one person owes to another when the relationship between the two people is such that one is obligated to exercise at least ordinary care that the other person not be injured. Duties may be created by law, contract, common sense, or a special relationship between the parties. If a person assumes additional responsibilities, the duty of care may be expanded. For example, schools and their employees have a duty to supervise students and provide them a safe environment while students are in their custody or control. Under this duty schools are responsible for student safety while students are loading and unloading from buses on school grounds. Schools could acquire a duty to supervise students even before official arrival time, if school employees had undertaken this responsibility in the past.

- **Breach**

Once a duty has been established, the injured individual must show that the duty was breached. The duty has been breached when the individual unreasonably fails to carry out the duty. In carrying out his/her duties, one is expected to act as an ordinary, prudent, and reasonable person considering all of the circumstances involved. The court or jury makes a determination of how the reasonable person would have acted; if the individual did less, he/she is found negligent.

The standard varies for professionals, e.g., a reasonable teacher or principal. Defendants who are professionals will be held to a standard based on the skills or training they should have acquired for that position. Thus, the question to be answered is: What would the reasonable professional have done under the same or similar circumstances?

The standard varies also with the circumstances of each situation. Some of the factors that may be considered in determining the standard of care include:

- ✓ Age and maturity of the parties involved;
- ✓ Nature of the risk involved;
- ✓ Precautions taken to avoid injury;
- ✓ Environment and context, including characteristics of students, location, physical characteristics, etc.;
- ✓ Type of activity engaged in; and
- ✓ Previous practice and experience.

- **Causation**

To recover for an injury, the plaintiff must show that the defendant's negligence was the cause of the injury. If the accident would have occurred anyway, there can be no liability. The defendant's negligent act must be a continuous and active force leading up to the actual harm. When there is a lapse of time between the defendant's negligence and the injury, other contributing causes and intervening factors may be the actual cause of the injury. The original wrongdoer could still be found liable if the intervening or contributing cause was a logical result of the negligence. For example, if a school holds a track meet at its sports arena with bleachers in an unsafe condition, it could be liable for injuries sustained by fans who become excited and jump up and down on the bleachers, causing them to collapse. But it would not be responsible for damages to the car of an injured fan who drives himself to the hospital and is hit by a drunk driver along the way.

- **Injury**

The plaintiff must show an actual loss or real damage, e.g., a physical bodily injury or a real loss. Compensation may include direct monetary damages for medical expenses, replacement of property, lost wages, etc. The plaintiff may have intangible injuries, e.g., pain and suffering or emotional distress. In some situations an intangible injury is sufficient for the plaintiff to recover money damages. However, there are states that require at least a physical manifestation of an injury, if there are no tangible injuries.

PERSONAL LIABILITY OF SCHOOL BOARD MEMBERS

Members of school boards are generally not held personally responsible for acts done by them as a board or in the discharge of their duties as board members. They are protected by governmental immunity[1] which generally shields public officials from being sued for carrying out their governmental functions. However, governmental immunity does not protect board members from being sued as individuals for their own acts of negligence.[2] In other words, board members may still be subjected to liability in connection with their service on school boards, if their actions fall outside the scope of service as a board member. (See Chapter 4 for more discussion of defenses and immunities against board member liability.)

DOCTRINE OF *RESPONDEAT SUPERIOR*

A school district may be held liable under the law of most jurisdictions for civil wrongs, or torts, committed by employees, officers, or agents acting within the scope of their employment. This legal doctrine, known as *respondeat superior*, usually cannot be used to hold districts liable for intentional torts committed by district employees.[3] That's because torts involving bad faith, malicious misconduct, or wanton and willful misconduct are treated as acts outside the scope of employment or authority.[4] In addition, members of a school board will not be held personally liable under *respondeat superior* for injuries caused by the negligence of employees, because the employees work for the board as a whole rather than the individual members.[5]

EDUCATIONAL MALPRACTICE: AN INTENTIONAL TORT?

An educational malpractice claim may be framed as an intentional and malicious tort by a school board.[6] Plaintiffs typically assert either that the school district has failed to adequately educate the student in basic academic skills or that the district has negligently or intentionally misrepresented the student's skill and grade level.[7]

To win an educational malpractice claim, a parent would have to prove the student was injured willfully and maliciously by those entrusted with his or her educational care.[8] Most likely, a school board could not be held liable for such intentional conduct under the doctrine of *respondeat superior* because such actions would never be considered in the furtherance of the educational system's purposes.[9] Although many courts have rejected educational malpractice claims,[10] school boards should still be concerned about this theory of liability. As states and the federal government continue to impose more "reforms" and standards for local boards to follow, new claims may emerge.

CLAIMS INVOLVING SCHOOL DISTRICT EMPLOYEES

Liability for Negligent Hiring or Retention of Employees

School boards may be held liable for negligent hiring or retention of employees. Simply stated, this legal theory says the school board should be held legally responsible in cases where it failed to exercise reasonable care in keeping or hiring an employee who ends up injuring someone else.[11]

In some states, governmental immunity would protect the board from such claims. However, where this protection is unavailable or has been waived, courts have found school boards liable to students for injuries resulting from the hiring or retaining of incompetent or otherwise unsuitable teachers.[12] In some states, school boards may be immune from liability for the negligence of their employees, but still may be held liable for their own negligence in hiring an incompetent teacher.[13]

An action for negligent hiring differs from one based on *respondeat superior* because it allows the plaintiff to sue for acts of an employee committed *outside the course and scope of employment*.[14] In determining whether a school board should be held responsible, courts will consider whether or not the board exercised the level of care a "reasonable person under the circumstances" would in selecting or retaining an employee for the particular duties to be performed.[15] To obtain damages for this type of claim, a plaintiff must show that the board could have reasonably foreseen the risk of harm to another person by hiring or retaining the employee and a causal connection between the injury and the alleged incompetence.[16]

"It is incumbent on school officials to obtain information on the fitness of all employees who have positions that can harm third parties, especially students."[17] Additionally, a job analysis should be conducted, the application and interview should center on pertinent skills and qualities, and documentation should be required.[18] Supervision of employees is another important preventive measure.[19]

Defamation

Members of school boards generally cannot be sued for defamation as long as the statements were made in the performance of official responsibilities.[20] (Defamation is saying or writing words that injure someone's reputation.) Defamation claims typically stem from statements about the employment status of a school employee.[21] In some states, school boards may publicize their decision to discharge a teacher[22] without fear of liability for defamation. Courts have granted boards this privilege on three bases: (1) the board was acting in a quasi-judicial capacity when it discharged the teacher; (2) the law required publication of the decision; and (3) the decision was a discretionary function of the board.[23]

But some courts have granted school board members only limited protection from defamation claims[24] even with respect to statements made in the course of official proceedings.[25] To be entitled to this limited privilege, the board member must have made the statement in the discharge of a public duty, have a common duty or interest with the recipient of the statement, and have a duty to other board members to communicate matters affecting the continued employment of a teacher.[26]

Wrongful Termination

In general, school boards and their members are protected from liability for their actions in discharging an employee.[27] This is because courts usually view hiring and firing decisions as governmental functions. Some states call employment decisions discretionary—a type of act that involves making a judgment call. Discretionary acts usually cannot be the basis for holding public officials liable. However, if there is no basis for granting school board members protection or the immunity has been removed by statute or case law, then school board members may be held liable for wrongful discharge of employees.[28]

LIABILITY FOR INJURY

Injury or Damage from Improper Maintenance of Facilities or Premises

School boards may be sued for allegedly dangerous, defective, unsafe, or negligent conditions of school buildings and premises. Because the school board has a duty to maintain the school grounds and facilities in a reasonably safe condition, defective premises that cause injuries may result in liability for the school board.[29]

POTENTIALLY DANGEROUS FACILITY CONDITIONS

Some examples of conditions that may result in liability include:

- slippery entranceways or ramps;
- gates out of repair;[30]
- unlighted areas;
- inadequate handrails;
- violations of state building codes;[31]
- doors in a defective or dangerous condition;[32]
- ceilings or floors in a defective condition;
- hazardous objects left in a public area;[33]
- dangerous or defective equipment in a school gymnasium;[34]
- lack of proper fire safety equipment;[35] and,
- improperly stored material.[36]

In a few states, school boards may avoid liability for unsafe conditions entirely where the plaintiff's own negligence contributed to his injury.[37] This theory is known as contributory negligence. For example, schools have been held not to be liable where students were instructed not to engage in a certain behavior or activity and were injured while disobeying the instruction.[38] More states use a theory called comparative negligence which awards damages in proportion to the degree of responsibility for the injury.

Injuries Resulting from Lack or Insufficiency of Supervision

A school board may be held liable for negligent supervision if it fails to use ordinary care to protect its students from injury under circumstances where the injury could reasonably have been foreseen and prevented.[39] Moreover, a school board may be held responsible for the damages and injuries caused by the negligent acts of supervisory personnel. In deciding claims based on lack of supervision, courts will determine if the school owed any duty to the injured person, and if so, whether the supervisory personnel reasonably met their obligations.[40]

Many cases have held that supervisory personnel only have a duty to prevent injuries where the specific injury is reasonably foreseeable.[41] But alternative case law indicates that school personnel may have a duty to provide adequate supervision where a general potential for danger is apparent.[42]

COMMON NEGLIGENT SUPERVISION CLAIMS

No Liability Generally Found

- Injuries to children walking or cycling home from school when school district has not assumed duty of transporting children between home and school.[43]
- Injuries occurring during non-school sponsored playground activities after school day has ended.[44]

Liability Generally Found

- Teacher inflicting direct injury on a student,[45] e.g., excessive corporal punishment.
- Injuries to students while performing a task on teacher's direct order, either without proper instruction or supervision or under protest.[46]
- Injuries caused by lack or insufficiency of supervision during lunch and recess hours.[47]

- **Injuries Caused by Fellow Students**

Generally, a school board will not be liable for the acts or omissions of students that result in injury or damage to other students.[48] But liability has been imposed for failure to supervise where there are foreseeable dangerous circumstances.[49] If the supervision necessary to avoid the danger would have prevented the injury, the school may be held liable for the resulting damage.[50]

- **Failure to Protect Student from a Crime**

Absent a special duty of protection, no liability usually arises from failure of a school to provide security against physical attacks by outside individuals who pose a threat to students.[51] For a special duty of protection to arise, facts must show that the school created a "special danger" and was aware of the potential danger.[52]

Nevertheless, recent tragedies at Columbine and other schools around the country present new challenges. In addition, the events of September 11, 2001 heightened the public's general awareness of safety threats in public places. This may, in the long-term, affect the law of liability in this area. In the meanwhile, school officials should consider adopting security measures against such threats.

Physical Education, Athletic Events, Chemistry, or Shop Work Injuries

Offering courses involving physical education, manual training, woodworking, shop work, and chemistry laboratory experiments, and maintaining school athletic teams are considered governmental functions because such offerings constitute an integral part of public education.[53] For this reason, where only negligence is involved, school boards are generally immune from tort liability for death or personal injuries sustained by students or other persons participating in these activities. Sometimes this immunity has been waived by statute or case law.

Since most of these activities involve some element of danger, the school district has a duty to warn of the danger and exercise proper supervision of the activities.[54] School boards may be held vicariously liable for injuries or damage resulting from these school-related activities for lack or insufficiency of supervision.[55]

Generally, participants in school-sponsored athletic events are deemed to have assumed any risks inherent in participation in those activities. Nonetheless, most jurisdictions have held that a school district owes participants a duty of reasonable care, generally requiring provision of proper and safe equipment, a facility that is not inherently dangerous, adequate warnings and instruction, and non-negligent supervision.[56] Courts have also held that schools are generally liable to spectators for defective conditions of premises owned by the school where the school had notice of conditions that created an unreasonable risk of harm.[57]

MISCLASSIFICATION OR WRONGFUL PLACEMENT OF STUDENTS IN SPECIAL EDUCATION

School boards are generally not liable for alleged negligence in erroneously classifying and placing a student in a special education program.[58] But in cases where courts have allowed an action for misclassification or wrongful placement, the courts held that the board owed a duty of reasonable care in testing and placing students in special programs.[59]

TRANSPORTATION OF STUDENTS

If a school district provides transportation to students between school and home, it owes a duty of care with respect to that transportation.[60] The school board may be held vicariously liable for the negligence of bus drivers.[61] Where a student is struck by a bus on school grounds, the school district may be held liable based on inadequate supervision of the loading area.[62] School boards may also be held responsible for injuries resulting from dangerous traffic configurations in loading areas.[63]

SEXUAL ABUSE AND HARASSMENT OF STUDENTS

Sexual harassment claims by students have proliferated in the last few years.[64] Claims under federal law are more common, but state law claims are also emerging.[65] A school district generally has a duty not to hire or retain employees that it knows, or should know, have a propensity for sexually abusing students. If a plaintiff can show that the school knew or reasonably should have known of the offending employee's proclivities, the district may be liable for the foreseeable sexual abuse of students by that employee."[66] In some cases, a court may find the school district responsible based on a state civil rights statute rather than negligence.[67] Assertions that the school board should be held vicariously liable for the employee's conduct under the doctrine of *respondeat superior* generally fail because sexually molesting or abusing a student is outside the scope of employment or authority.[68] If a student is sexually harassed or abused by another student, the victim may assert various claims against school authorities, including inadequate supervision and negligent infliction of emotional distress.[69]

CONCLUSION

As shown in this summary, school boards and their individual members may be held liable for their own conduct and that of others in the school community. These issues should be taken seriously. Consultation with legal counsel should not be considered a luxury, but an essential element to good preventive practices.

THINGS TO KNOW ABOUT NEGLIGENCE

- ✓ State tort laws are a key source of school board member liability.
- ✓ The most common tort for which board members are sued is negligence.
- ✓ To sue for negligence, a plaintiff must show that the board breached a duty of care which caused injury to the plaintiff.
- ✓ Legal duties are created by law, contract, common sense or a special relationship between the parties.
- ✓ Board members breach their duty when they fail to act as a prudent and reasonable person would under the circumstances, taking into account any applicable professional standards.
- ✓ To be liable the board member's breach of duty must be the cause of actual loss or injury to the plaintiff. If the damage would have occurred anyway, there is no liability.
- ✓ Board members are generally not personally liable for acts done by them as a board or in discharging their duties.
- ✓ Boards may be held liable for wrongs committed by school employees acting within the scope of their duties.

WAYS TO AVOID COMMON TORT CLAIMS

✓ **Negligent Hiring or Retention**—Adopt and implement policies and procedures that reduce the likelihood of hiring or keeping an employee whose past acts indicate potential risk of injuring someone else.

✓ **Defamation**—Limit negative remarks about an individual's employment status to those necessary to carry out board's official duties.

✓ **Wrongful Termination**—Ensure employees are terminated only for lawful reasons and are afforded due process in accordance with constitutional and statutory requirements and board policy. Do not make decisions based on personal interests, feelings, opinions or rumors.

✓ **Improper Maintenance of Facilities**—Ensure that district implements effective maintenance procedures to keep school buildings and premises in a safe condition.

✓ **Negligent Supervision**—Ensure that school staff provides proper supervision to protect students from injury during school activities. Where activities involve some element of danger, such as athletics, shop work or laboratory experiments, staff must be especially vigilant and warn of any danger.

✓ **Student Transportation Injuries**—Ensure bus drivers are properly trained and buses are properly maintained; provide adequate supervision when students are loading onto and unloading from buses; and maintain safe traffic configurations in loading areas.

✓ **Sexual Abuse or Harassment of Students**—Investigate backgrounds of applicants for positions involving contact with children. Adopt, implement and publicize policies prohibiting abuse and harassment and mandating prompt investigation of any complaints. Take appropriate corrective action, if necessary.

ENDNOTES

1. 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* § 586 (2001).
2. *Id.*
3. *Id.* at §§ 485, 150 (citations omitted).
4. *Id.* (citations omitted).
5. *Id.*
6. *Id.* at § 578.
7. Joel E. Smith, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Educational Malpractice*, 1 A.L.R. 4th 1139, 1140 (1980).
8. 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* § 578 (2001).
9. *Id.*
10. Smith, 1 A.L.R. 4th at 1140 (citing W. v. San Francisco Unified School Dist., 131 Cal. Rptr. 854 (1st Dist. 1976); Donohue v. Copiague Union Free School Dist., 391 N.E. 2d 1352 (N.Y. 1979)).
11. Bruce Beezer, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 Educ. Law Rep. 1117 (1990).
12. David P. Chapus, Annotation, *Liability of School Authorities for Hiring or Retaining Incompetent or Otherwise Unsuitable Teachers*, 60 A.L.R. 4th 260 (1988).
13. *Id.* at 273 (citing Doe v. Durtschi, 716 P.2d 1238 (Idaho 1968) (holding school district may be liable for its own negligence in retaining a teacher when district is aware of teacher's dangerous proclivities)).
14. Beezer, 56 Educ. Law Rep. at 1117.
15. *Id.* at 1118.
16. *Id.*; Chapus, 60 A.L.R. 4th at 266.
17. Beezer, 56 Educ. Law Rep. at 1124.
18. *Id.*
19. *Id.*
20. 50 Am. Jur. 2d *Libel and Slander* § 290 (1995). *See* Freier v. Independent School Dist. No. 197, 356 N.W.2d 724 (Minn. Ct. App. 1984).
21. *Id.*

22. Hon. Peter S. Popovich and Donald W. Niles, *School Board Immunity from Libel Actions—Fr[e]ier v. Independent School District No. 197*, 21 EDUC. LAW REP. 1099 (1985).

23. *Id.*

24. 50 AM. JUR. 2d *Libel and Slander* § 290; *Frier*, 356 N.W.2d 724.

25. Kristine Cordier Karnezis, Annotation, *Libel and Slander: Privileged Nature of Statements or Utterances by Member of School Board in Course of Official Proceedings*, 85 A.L.R. 3d 1137, 1144 (1978) (citing Roberts v. Board of Educ., 25 F. Supp. 2d 866 (N.D. Ill. 1998) (holding that under Illinois law, individual members of board of education were privileged from liability for alleged defamation of former superintendent if statements were made within the scope of official duties); Connor v. Timothy, 33 P.2d 293 (Ariz. 1934) (holding that while statement made by school board member at a meeting of board of trustees was entitled to a qualified privilege, there was sufficient evidence of malice to defeat the privilege and upheld jury verdict for defamed party)).

26 Karnezis, 85 A.L.R. 3d at 1140 (citing McClain v. Anderson, 439 S.W.2d 296 (Ark. 1969); *Henry v. Mobely*, 33 N.E. 981, *later app.*, 51 N.E. 497 (Ind. 1893); Connor v. Timothy, 33 P.2d 293 (Ariz. 1934)).

27. 57 AM. JUR. 2d *Municipal, County, School, & State Tort Liability* § 592 (2001) (citing Galli v. Kirkeby, 249 N.W.2d 149 (Mich. 1976); State ex rel. Gallagher v. Kansas City, 7 S.W.2d 357 (Mo. 1928); City of Dallas v. Smith, 107 S.W.2d 872 (Comm'n App. 1937)).

28. *Id.*

29. 57 AM. JUR. 2d *Municipal, County, School, & State Tort Liability* § 517 (2001).

30. *Id.* at § 515 (citing Young v. City of New York, 33 A.2d 915 (2d Dep't 1970); Lorenz v. Santa Monica City High School Dist., 124 P.2d 846 (2d Dist. 1942)).

31. *Id.* (citing Robotham v. State, 54 Misc. 2d 363 (Ct. Cl. 1967); Cooper v. Smithtown Central School Dist., 83 A.2d 828 (2d Dep't 1981); Wiener v. Board of Educ. of City of New York, 48 A.2d 887 (2d Dep't 1975); Andre v. Allynn, 190 P.2d 949 (1st Dist. 1948); Hovey v. State, 261 A. 759 (3d Dep't 1941), *judgment aff'd*, 39 N.E.2d 287 (1941)).

32. *Id.* (citing Bielaska v. Town of Waterford, 491 A.2d 1071 (Conn. 1985); Williams v. Orleans Parish School Bd., 317 So. 2d 643 (La. Ct. App. 1975); Johnson v. Orleans Parish School Bd., 261 So. 2d 699 (La. Ct. App. 1972); Smith v. Clintondale School Dist., 165 N.W.2d 332 (Mich. App. 1968)).

33. *Id.* (citing Kidwell v. School Dist. No. 300, Whitman County, 335 P.2d 805 (Wash. 1959)).

34. *Id.* (citing Woodring v. Board of Educ. of Manhasset Union Free School Dist., 79 A.D. 2d 1022 (2d Dep't 1981); Wilkinson v. Hartford Acc. and Indem. Co., 411 So. 2d 22 (La. 1982); Studley v. School Dist. No. 38 of Hall County, 316 N.W.2d 603 (Neb. 1982)).

35. *Id.* (citing Agnew v. State, 166 Misc. 602 (Ct. Cl. 1938)).

36. *Id.* (citing Swartley v. Seattle School Dist. No. 1, 421 P.2d 1099 (Wash. 1966)).

37. Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents due to Condition of Buildings or Equipment*, 34 A.L.R. 3d 1166, 1173 (1970) (citations omitted).

38. *Id.* at 1173, *citing Basmajian v. Board of Educ.*, 207 N.Y.S. 298 (N.Y. 1925); *Mitchell v. State*, 20 Misc. 381 (N.Y. 1959).

39. Brown v. Youth Services Intern. of South Dakota, 89 F. Supp. 2d 1095 (D.S.D. 2000).

40. Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision*, 38 A.L.R. 3d 830, 834 (1971).

41. *Id.* (citations omitted).

42. *Id.* at 834-35 (citing Hoose v. Drumm, 22 N.E.2d 233 (1939), *reh'g denied*, 35 N.E.2d 922.

43. *Id.* (citations omitted).

44. *Id.* (citations omitted).

45. *Id.* at 835 (citations omitted).

46. *Id.* (citing Bellman v. San Franscisco High School Dist., 81 P.2d 894 (1938); Gardner v. State, 22 N.E. 2d 344 (1939)).

47. Korpela, 38 A.L.R. 3d at 836 (citations omitted).

48. 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* § 570 (2001).

49. *Id.* (citing Munson v. Board of Educ. of Central School Dist. No. 1 of Towns of Westport, Essex, Moriah, Elizabethtown and Lewis, Essex County, 17 A.D. 2d 687 (3d Dep't 1962), *judgment aff'd*, 192 N.E.2d 272 (N.Y. 1963); Cirillo v. Milwaukee, 150 N.W.2d 460 (Wis. 1967)).

50. *Id.*

51. 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* § 576 (2001).

52. *Id.*; Joel E. Smith, Annotation, *Liability of University, College, or Other School for Failure to Protect Student from Crime*, 1 A.L.R. 4th 1099 (1980).

53. 57 Am. Jur. 2d *Municipal, County, School, & State Tort Liability* §§ 489, 490, 491 (2001).

54. Allan E. Korpela, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Associated with Chemistry Experiments, Shopwork, and Manual or Vocational Training*, 35 A.L.R. 3d 758, 763-64 (1971).

55. *See* pages 15-16 for more discussion of negligent supervision.

56. Caroline R. Krivacka and Paul D. Krivacka, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Occurring during School Athletic Events*, 68 A.L.R. 5th 663, 675 (1999).

57. *Id.* at 676.

58. Theresa Ludwig Kruk, Annotation, *Tort Liability of Public School or Government Agency for Misclassification or Wrongful Placement of Student in Special Education Program*, 33 A.L.R.4th 1166, 1168 (1984).

59. *Id.* at 1170 (citing M. v. State, 649 P.2d 425 (Mont. 1982)).

60. Tracey A. Bateman, Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Accidents Associated with Transportation of Students*, 23 A.L.R. 5th 1, 17 (1994).

61. *See* page 14 above for more discussion of vicarious liability.

62. Bateman, 23 A.L.R. 5th at 17. *See, e.g.*, R.L.R. v. Prague Public School Dist. I-103, 838 F. Supp. 1526 (W.D. Okla. 1993) (applying U.S. and Oklahoma law).

63. *See* Constantinescu v. Conejo Valley Unified Sch. Dist., 20 Cal. Rptr. 2d 734 (Cal. 1993).

64. Robin Cheryl Miller, Annotation, *Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student*, 86 A.L.R. 5th 1, 15 (2001).

65. *Id.* at 15.

66. *Id.* at 23 (citing Marquay v. Eno, 662 A.2d 272 (N.H. 1995)).

67. *Id.* at 16 (citations omitted).

68. *Id.* (citations omitted).

69. *Id.* at 17 (citations omitted).

CHAPTER 3

The Section 1983 Claim

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School board members may be sued for allegedly violating someone's federal rights. To bring these claims before the courts, plaintiffs often use Section 1983 in Title 42 of the United States Code, known in legal circles simply as "Section 1983". (The United States Code is the classification system for all federal laws.) The discussion below focuses on civil rights claims asserted under Section 1983 and does not address a board's or district's potential liability under other federal civil rights statutes.[1]

SECTION 1983

The statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

BASIC ELEMENTS

To sue a school board under Section 1983, a plaintiff must assert that a "person", acting "under color" of State law, violated his or her rights under the United States Constitution or certain federal statutes. Read literally, Section 1983 seems to establish a right to sue for any violation of one's rights under the Constitution or other federal law, but in fact there are limitations.[2] The Supreme Court has said that a Section 1983 claim cannot be pursued where the federal law in question does not create a binding obligation on a governmental agency or official, or where the statute in question is so vague that a court could not determine whether a deprivation had occurred.[3]

Keep in mind that Section 1983 does not itself create any additional substantive legal rights, but merely allows an aggrieved person to sue for money damages or other relief when his rights under the Constitution or other federal law have been violated.[4] A Section 1983 claim must be based on a specific federal right that has been violated. The plaintiff does not have to show any abusive government conduct beyond the constitutional or statutory violation itself[5] but must show a causal relationship between the violation and the harm he has suffered. Where a government action is only partially based on criteria running afoul of constitutional or statutory provisions, a Section 1983 claim will fail if it clearly appears that the board would have made the same decision even without the unlawful factor.[6]

Under Section 1983, the term "person" plainly includes local public officials who use their office to violate another's rights under federal law. Municipalities and other public bodies, such as school boards, are also "persons" subject to Section 1983 liability in state and federal courts.[7] Depending on the alleged violation, individual board members as well as the board itself may be held liable when the action can fairly be said to represent official policy.[8]

OFFICIAL LIABILITY VS. PERSONAL LIABILITY

A civil rights complaint may seek damages against individual board members in their "official" capacities, their "individual" capacities, or both. The difference between the two is as simple as it is meaningful. Suing board members in their "official" capacity is just

another way of naming the board itself and, for all intents and purposes, is treated that way.[9] Naming board members in their "individual" capacities, of course, does expose the individual to personal liability, subject to the immunities discussed in Chapter 4 and also to possible indemnification rights from the board itself as discussed below.

Differences Between Official and Personal Capacity Suits

Under certain circumstances, the law grants board members certain protections, known as immunities, from personal liability under Section 1983. It does not provide these same shields to agencies of local government, including school boards.[10] If a plaintiff can successfully establish that a policy or official act of the school district violated a constitutional right, the board as an entity may be liable under Section 1983 whether the action was legislative, administrative or *quasi*-judicial in nature. This is true even if the law was not clearly established at the time the violation occurred. Thus, in a novel or "test" case where the board and its individual members are sued for violating a constitutional right not yet firmly established in the law, the school board as an entity may be liable while individual members are not.

This differential treatment is quite intentional. The Supreme Court explained it in *Owen v. City of Independence*:

> § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. * * * The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional

> infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.[11]

Official Liability Based on Formal or De Facto Policy

Although school boards are "persons" subject to suit under Section 1983,[12] they are not liable for all violations committed by school board members or employees. In the 1978 *Monell* case, the Supreme Court limited the entity's liability to an unconstitutional act which "implement[s] or execute[s] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[13] The policy or official position needed to trigger liability need not be formal. Deliberate indifference by the school board to a pattern of wrongful behavior by lower-level employees may be sufficient under Section 1983, and will be actionable when there is a causal relationship between that *de facto* policy and the harm caused. This theory of liability naturally requires proof that the school board members knew of the wrongful conduct and, by their silence or failure to act, ratified it. Deliberate indifference claims have been raised both in the form of failure to take adequate steps to remedy a wrong and failure to train employees in how to avoid, prevent, detect and investigate alleged wrongs.[14]

Official Liability Based on Policymaking Authority

Knowledge on the part of school board members is not always required to hold the district liable. When a school district employee has "final policymaking authority" under state law to take action legally binding on the school district, a Section 1983 violation by that employee may be imputed to the school board.[15] In other words, the board might be held vicariously liable.

In determining whether a school employee has been delegated final policymaking authority so that the board could be held vicariously liable, courts have reviewed both state law and actual practice. Among the determining factors are:

✓ Did the employee have final authority by law with respect to decisions in this area or were they subject to individual review by higher officials?
✓ How much deference did the reviewing entity give the decisions as a matter of practice?
✓ Did the reviewing entity investigate or otherwise know the basis for the decisions?
✓ Did the reviewing entity expressly approve the decision?
✓ Was the decision one in a series manifesting a custom or usage of which the policymaker must have been aware?[16]

Applying these factors, case law has established that school boards will not be held vicariously liable for relying on facially valid recommendations of supervisors, even if based on an undisclosed wrongful motive, so long as no one with final decisionmaking power under state law had reason to know of the improper motivation. This is particularly helpful where state law reserves to the school board itself exclusive power to make certain decisions.

Finally, unintentional or negligent conduct does not give rise to a constitutional claim.[17] Nor are school boards liable under Section 1983 for random, unauthorized acts of lower level employees.[18] However, they may be liable where a constitutional deprivation is foreseeable and predeprivation due process is feasible.[19]

Remember these principles relate to civil rights claims asserted under Section 1983 and do not reflect upon a board's or district's possible liability under other civil rights statutes.[20]

REMEDIES FOR SUCCESSFUL CLAIMANTS

Damages

Successful plaintiffs in Section 1983 cases are entitled in appropriate cases to money damages from any "person" found liable, as well as injunctive relief. Damage awards under Section 1983 have two components. First, compensatory damages are designed to make the plaintiff whole. In the case of economic harm, damages are awarded in an amount sufficient to compensate the plaintiff for the harm done. Successful plaintiffs are also entitled to compensation for non-economic harm caused by the wrongful conduct, including emotional trauma and injury to reputation.[21] Compensa-

tory damages are limited to actual harm. A technical violation of a federal right does not entitle a plaintiff to compensatory damages in the absence of demonstrated harm.[22]

A second type of damages, known as punitive or exemplary damages, is intended to punish the wrongdoer and to deter future conduct. It is not necessary to prove actual malice or ill will. Reckless disregard of the plaintiff's rights or deliberate indifference will do.[23] Punitive damages may not, however, be awarded against the school district itself.[24]

Attorney's Fees

In our court system, litigants usually bear the cost of their own legal counsel, win or lose. But in some cases a statute or other specific legal rule may require the loser to pay. Most state and federal "human rights" statutes fall into this category, and Section 1983 is no exception.[25]

The statutory language addressing counsel fees for Section 1983 actions seems evenhanded on its face:"[T]he court in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Application of this standard in practice is anything but. Prevailing plaintiffs will normally be awarded counsel fees as a matter of course, even in a close case. Prevailing defendants, on the other hand, will be awarded fees only if the plaintiff's claim was frivolous or brought in bad faith.[26]

Personal Liability

In most states, an award of compensatory damages and counsel fees against individual school board members will pose no serious threat to the individual's personal assets, for two reasons. First, since school board members are usually the final policymakers of the school district, a judgment against the individual board members will typically be accompanied by a judgment against the school district itself and will be paid from school district funds. Second, many states provide by legislation or board policy for indemnification of board members or employees from exposure in civil actions. Insurance coverage for civil rights liability is now routinely available from most national insurance carriers covering school districts.[27]

A real risk of personal exposure does arise when punitive damages are awarded against individual board members. Since such awards require proof of more egregious conduct, state indemnification statutes and insurance policies often exclude reimbursement to board members and employees. This is grounded in many states' public policy of indemnifying public officials who make innocent mistakes in "good faith", but against spending taxpayers' funds to protect those who act in "bad faith". (See Chapter 5 for more information on insurance coverage for potential liability.)

COMMON SECTION 1983 CLAIMS

What actions by school board members pose the greatest risk of liability under Section 1983? The powers and duties of school board members vary from state to state, but some aspects of the job are constant. All school boards act in a legislative capacity, adopting policies for operation of the school district. They also act in an executive capacity, making administrative decisions (such as an out-of-district placement of a disabled pupil or refusal to extend the contract of a non-tenured superintendent). In disciplinary matters, the school board operates in a *quasi*-judicial capacity, evaluating evidence, making findings of fact and applying law. In most cases, a finding of Section 1983 liability against a school board or school board member is based on some affirmative conduct, in the form of a vote or some other discrete action, that violates an individual's federal rights. However, it is possible for *inaction* to give rise to a claim, such as where a school board is "deliberately indifferent" to a pattern of wrongful conduct, to the point where its inaction can be said to effectively constitute board policy.[28]

A review of all potential Section 1983 claims against school districts is beyond the scope of this chapter. Most claims against individual board members fall into several categories: personnel decisions involving termination, transfer or failure to promote staff; discipline of staff and students; conduct of board meetings; and adoption of policies which inhibit free expression, establish or inhibit religion, or infringe some other judicially recognized liberty. More recently, the courts have begun to grapple with the issue of liability for failing to protect the public from constitutional violations by others.

Here is a summary of basic constitutional law in the areas of Fourteenth Amendment procedural due process and First Amendment free expression, two of the most fertile grounds for Section 1983 claims against school board members.

Personnel Decisions-Due Process

A school board as an employer enters into contracts with its staff. Teachers are frequently offered a series of fixed-term contracts after which they may acquire tenure. Non-instructional employees are sometimes appointed on an *ad hoc* or hourly basis, terminable at will by either party. The nature of the employment relationship in each case determines the constitutional rights of the employee and the obligations of the school board toward that employee.[29]

- **Protected Interests**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution bars government action which "deprive[s] any person of life, liberty, or property, without due process of law." Employees have a constitutionally protected "property" interest in the enjoyment of contractual rights with their employer. Even employees who have no contractual or "property" right to continued employment do enjoy a "liberty" interest in freedom to secure new employment without having to overcome stigmatizing publicity from their former employers.

This does not mean school employees can make a "federal case" out of every perceived indignity or mere change in work assignment. The Supreme Court once stated,

> [t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.[30]

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But where school employees have experienced a substantial and tangible adverse employment action, they must receive at least a modicum of procedural fairness. The Due Process Clause requires public employers to give any employee with existing contract or tenure rights some kind of hearing, preceded by fair notice of the reasons for the action. So long as the grounds for termination do not violate an independent federal right, the Constitution lets the state define the grounds for discharge of public employees. Whatever those grounds may be, the Constitution entitles all employees with a protected interest to receive procedural due process of law.

- **Required Procedures**

Due process is a flexible concept. How elaborate the notice and hearing must be and when they must be given depend on the severity of the employer's action and the extent of the employee's reasonable expectancy of continued employment. Many states have laws establishing mandatory procedures for removal of tenured school district employees. When no such statute applies, school boards should seek the advice of the school district's attorney on how the courts in a particular state and federal circuit apply the Due Process Clause to personnel actions.

There are certain minimum requirements. When a school district employee is hired for a fixed term, he has no expectation of continued employment beyond the expiration of that term. Should the school district wish not to extend the contract, no due process is constitutionally required since the employee is not being deprive[d] of any "property" interest. The same, of course, holds true for employees at will (employees who work without benefit of contract).

There is an important exception to this rule. If state law or school district policy grants employees more "due process" than the Fourteenth Amendment would otherwise require, that may itself give employees an additional "property" interest. Failure to follow those procedures may then trigger a claim that the school board violated the Due Process Clause. Because many school districts use boilerplate policy manuals furnished by outside services, it is crucial to review the language of these policies with a school attorney to assure that they do not afford more due process than the law requires – unless, of course, it is the school district's intent to do so.

Even when no "property" interest is at stake, the employee's constitutionally protected "liberty" interest in securing new employment must still be respected. This does not mean that board members need assist the employee in finding a job elsewhere but does require refraining from unnecessary public fanfare reflecting poorly on the employee's character or ability. The "liberty" element of the Due Process Clause presumes that employees have, if nothing else, a protected interest in their good names. For that reason, avoid unduly publicizing the grounds for discharging an employee.

- **Due Process for Terminations**

What does the Due Process Clause require to terminate a fixed-term contract in midstream or to discharge a tenured employee? All the Fourteenth Amendment requires is a pre-termination opportunity to respond, followed by a reasonably prompt post-termination administrative hearing. The pre-termination hearing need not definitively resolve the propriety of the discharge. It should be looked on as an initial check against mistaken decisions — a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. The essential elements of even this minimal pre-termination hearing are, as in all due process, notice and an opportunity to respond.[31] The post-termination hearing, on the other hand, must afford an opportunity for a fuller airing of the evidence.

- **Due Process for Suspensions**

School boards must provide appropriate due process when suspending employees with contractual or statutory job security. If an employee is suspended *with pay* pending investigation or the disposition of criminal charges, he may not be entitled to a prompt hearing because he has not been deprived of an interest protected by the Due Process Clause.[32] But even a suspension *without pay* does not automatically entitle an employee to a pre-suspension hearing. An employee's due process rights in that situation depend on a variety of factors, including the anticipated duration of the suspension, the gravity of the charges, and the financial impact on the employee.[33]

SUBSTANTIVE DUE PROCESS

The Due Process Clause also prohibits government conduct, regardless of the procedures employed, which is so outrageous that it would "shock the conscience" of any reasonable person. This "substantive" component of the Due Process Clause has sometimes been used to challenge offensive government action not explicitly addressed by some other constitutional provision. But the U.S. Supreme Court has grown reluctant to expand the scope of "substantive" due process, and has instructed courts to look to a particular amendment that likely provides a source of constitutional protection from government behavior.[34]

Free Expression

The First Amendment to the United States Constitution prohibits government action "abridging the freedom of speech." Board members sometimes stifle others' freedom of expression when cutting off debate during a board meeting, restricting what employees may say or disciplining a student for unacceptable expression at a school function. The law allows government officials to impose reasonable restrictions on the time, place and manner of expression as long as the restrictions are reasonably necessary to serve legitimate governmental purposes. An example of a valid "time-place-manner" restriction would be a reasonable time limit for public statements at board meetings. School boards are more likely to face legal challenge when they attempt to regulate the *content* of the expression, rather than merely the time, place or manner.

- **Public Board Meetings**

Most school boards and other public bodies afford the public an opportunity to comment during public meetings. But the Constitution does not require local government agencies to do so. Once the floor is open to the public, however, the board generally may not treat speakers differently based on the content of their message.

Former United States Supreme Court Justice Hugo Black once wrote:

> [T]he right of every person in this country to have his say, however unorthodox or unpopular he or his opinions may be, is guaranteed by the same constitutional amendment that protects the free press. Those who cherish freedom of the press here would do well to remember that this freedom cannot long survive the legislative snuffing out of freedom to believe and freedom to speak.[35]

Restrictions on content may be imposed when there is a clear and present danger that the message will bring about evils that government has a right to prevent. Mere public inconvenience, annoyance, or unrest are not enough.[36] The disruption of the orderly conduct of public meetings is one such evil. The board may restrict the content of public statements to precise topics announced in advance. But attempts to restrict the tone of a speaker's remarks is a grayer area. In any case, boards do not have to tolerate shouting matches or profanity to accommodate passionate public discourse.

When the speaker is a member of the school board itself, other concerns come into play. Individual board members generally enjoy greater freedom of speech during board meetings than members of the public do. This is so because board members, particularly those elected by the public, derive their right to speak not from the pleasure of the body itself but from the will of those who appointed or elected them.[37] However, individual members have no constitutional right to hold the public body hostage through filibuster or similar tactics. The chair must use an extra measure of caution when applying the principles cited above to fellow board members.

Board members may feel uncomfortable when employees or

pupils speak out on matters deemed sensitive or confidential during a board meeting. On closer scrutiny, the discomfort stems from restrictions on what the school board itself may (or must only) discuss in private session. Remember that once the board has created a forum for public comment at its meetings, it assumes the risk of airing unpopular or controversial views. When this happens, board members should keep in mind that the First Amendment does not require them to respond to these statements any more than it compels them to answer a letter from the same speaker to the editor of the local newspaper.

Boards should not exclude speakers from public meetings because the speaker happens to belong to a certain category or group of people. In a 1976 decision involving the Madison, Wisconsin School District, the Supreme Court reviewed a ruling that the school district committed an unfair labor practice by letting non-union teachers speak at a public meeting against the bargaining position advanced by the teachers' union. The Supreme Court of Wisconsin believed that by permitting non-union employees to address a topic of ongoing negotiation between the board and the exclusive negotiating representative, the board had engaged in unlawful negotiation.

The United States Supreme Court disagreed. The Court observed:

> Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and who are most vitally concerned with the proceedings. It is conceded that any citizen could have presented precisely the same points and provided the board with the same information as did [the non-union employee].
>
> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated* * * the participation in pubic discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its

views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.[10] (original footnote)

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[10] Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choice raised by the contract renewal demands.[38]

The decision to silence a speaker is often made in the heat of the moment by the chair of the meeting. It is unlikely that a fellow board member would be held liable for an isolated erroneous ruling by the chair. But longstanding acquiescence in a pattern of abusive rulings by the chair may establish the complicity necessary to impose legal responsibility.[39] In such cases individual board members and the board may be liable under Section 1983 for "deliberate indifference" to a pattern of unconstitutional conduct by others over a period of time. The misconduct may be deemed the official policy of the board because it has failed to stop it.

- **Student Free Speech**

The ground rules on regulation of student speech in school activities are fairly well established. The rules change according to the degree of entanglement between the student's expression and the school-sponsored activity. So far, the U.S. Supreme Court has recognized three categories of student speech that can be regulated through policy and discipline. The first category is speech that

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substantially disrupts or interferes with the work of the school or the rights of other students.[40] This is a high standard, requiring persuasive evidence that disruption is likely to occur. Typically, courts will examine the context of the words or symbols used, and any history of disruption under similar circumstances.[41] The second category is lewd, vulgar or profane language.[42] The third category includes speech which a reasonable observer would view as school-sponsored, where regulation is justified by legitimate pedagogical concerns.[43]

VERBAL HARASSMENT POLICIES

In recent years, many school boards have attempted to address student-to-student harassment and bigotry through adoption of policies prohibiting intimidating or insensitive messages or symbols. These policies, however well-intentioned, raise complicated constitutional issues. The federal courts agree that harassing *conduct* is not protected by the First Amendment. But as one federal appeals court recently noted in striking down a Pennsylvania school district's anti-harassment policy, "there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin, or that denigrate religious beliefs."[44] This aspect of constitutional law is still evolving, so school board members should seek legal advice before adopting policy is this area.

• Teacher Free Speech

School boards and administrators may control the curriculum taught in the schools within broad parameters established by state and federal education authorities. School districts usually allow teachers a certain amount of "academic freedom" to the extent it does not conflict with the prescribed curriculum or other pedagogical values embraced by the school board. School boards are entitled to hold teachers accountable for implementing the curriculum and related educational philosophies of the school

district without running afoul of teachers' right of free expression.

With respect to teacher expression outside the bounds of school-sponsored functions, the courts have struck a balance between the interests of the employee as a citizen commenting on matters of public concern and the interest of the school district in maintaining order.[45] The threshold question is whether the employee's statements concern matters of general public concern, or are mere gripes about personnel actions affecting their own terms and conditions of employment.[46]

When a statement by a public school employee addresses a public concern, especially when expressed on the employee's own time, discipline may be imposed only when the message meaningfully disrupts the orderly business of the district. This is a difficult balancing process, weighing the nature of the employee's expression against the legitimate need to maintain order and discipline. No adverse action may be taken against the employee unless the latter outweighs the former. Determining what constitutes a matter of public concern is often difficult, but at least one federal court has held that public criticism of a direct supervisor may, in some cases, be considered protected speech if it arises in the context of a community debate.[47]

EMPLOYEE FREE SPEECH VS. NEED FOR ORDER

Balancing an employee's right to free expression against the employer's interest in maintaining order is inherently subjective. Thus, court decisions in such cases are often conflicting and unpredictable. Yet most all courts agree that the following factors are pertinent:

- Need for harmony in the office or work place;
- Any deterioration in close working relationships necessary to the public function;
- Time, manner and place of the speech;
- Context in which the dispute arose;
- Degree of public interest in the speech; and,
- Any hindrance on the employee's ability to perform his or her duties.[48]

A school board exercises greater control over statements employees make in the course of performing their duties for the district. Because the board has hired the employee to accomplish its goals, the board has a legitimate interest in restricting the employee's speech to accomplish that objective.[49] Whether the employee is a classroom teacher or a custodian, he or she has been hired to do a job. Using the visibility of one's public employment as a soapbox to broadcast personal viewpoints on matters unrelated to the school's educational mission not only distracts one's attention from the performance of the work, but also poses a risk that others may perceive the employee's views as representative of the school district's.

Many school employees feel justified in expressing their personal views more liberally because of the "public forum" atmosphere of many of our schools. But schools may be deemed public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public.[50] If the facilities have instead been reserved for other intended purposes, then the forum is not a public one, and the school may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

"NONCONSTITUTIONAL" SECTION 1983 CLAIMS

So far this discussion has dealt with Section 1983 claims based on violations of the United States Constitution. But the statute is not so limited. Generally speaking, it gives individuals the ability to sue for violation of any "federal right," whether grounded in the Constitution or a federal statute.[51]

Courts use a two-part test to determine when Section 1983 may be used to assert a violation of a federal statute. First, the statute must create concrete rights intended by Congress to benefit the plaintiff, as compared with federal statutes which do no more than express a preference for certain kinds of treatment.[52] Second, if Congress has provided an independent comprehensive enforcement mechanism for protecting that federal right, Section 1983 cannot be used.[53]

Some lower federal courts had held that violation of certain federal statutes regulating school districts may give rise to Section 1983 actions. But recently, in *Gonzaga University v. Doe*,[54] the U.S. Supreme Court adopted a stringent test, holding that congressional intent to create rights personally enforceable through civil litigation must be clear. It held that individuals cannot use Section 1983 to sue schools for alleged violations of the Family Educational Rights and Privacy Act. The *Gonzaga* decision will require a reexamination of previous lower court decisions upholding Section 1983 claims based on the Individuals with Disabilities Education Act[55] and the Drug Abuse Prevention, Treatment and Rehabilitation Act.[56]

THINGS TO KNOW ABOUT SECTION 1983

- ✓ Board members and boards may be sued for violating someone's federal rights. These claims are often brought under a federal statute referred to as Section 1983.
- ✓ Section 1983 does not create any substantive legal rights but merely allows an aggrieved person to sue for money damages when his rights under the Constitution or other federal law have been violated.
- ✓ A Section 1983 claim may seek damages against individual board members in their official capacity, their individual capacity or both. Suing board members in their official capacity is equivalent to naming the board itself as a defendant.
- ✓ Under certain circumstances, individual board members (but not boards as a whole) may be able to use certain shields called "immunities" to avoid personal liability under Section 1983.
- ✓ Boards as public entities may be held liable for acts that implement or execute a formal or de facto policy. A de facto policy may be created where a board is deliberately indifferent to a pattern of wrongful behavior by lower level school employees.
- ✓ Boards may also be held vicariously liable for unlawful acts committed by a school employee who has "final policymaking authority" by virtue of state law or district practice.
- ✓ If a board loses in a Section 1983 case, it may have to pay compensatory damages and/or plaintiff's attorney's fees.
- ✓ Awards of compensatory damages and counsel fees against individual school board members usually pose no threat to the board member's personal assets because usually there is an accompanying judgment against the district or state law or board policy indemnifies the board members.

THINGS TO KNOW ABOUT COMMON 1983 CLAIMS

✓ Most Section 1983 claims fall into several categories: personnel decisions involving termination; transfer or failure to promote staff; discipline of staff and students; conduct of board meetings; and, adoption of policies that inhibit free expression, establish or inhibit religion or infringe some other judicially recognized liberty.

Due Process

✓ The Due Process Clause of the Fourteenth Amendment requires school boards to give employees due process before taking away any property interest they have in continued employment. This property interest is usually created by state laws such as those granting tenure rights, by contract or by district policy.

✓ Basic due process includes some kind of hearing preceded by fair notice of the reasons for the board's actions. How elaborate the notice and hearing must be and when they must be given depend on the severity of the employer's action and the extent of the employee's reasonable expectancy of continued employment.

✓ To terminate a tenured employee the board must provide at least a pre-termination opportunity to respond, followed by a reasonably prompt post-termination administrative hearing. The pre-termination procedures are a check against mistaken decisions, but the post-termination hearing must afford an opportunity for a fuller airing of the evidence.

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Free Expression

- ✓ The First Amendment prohibits government action "abridging the freedom of speech."
- ✓ School boards can impose reasonable time, place and manner restrictions on speech as long as the restrictions serve a legitimate governmental purpose. Legal challenges are more likely to arise when the board attempts to regulate the content of the expression.
- ✓ If a board opens its meetings to the public, it may restrict the content of public statements to the topics on the board's agenda. It should not attempt to restrict the tone of a speaker's remarks and should not exclude speakers because they happen to belong to a certain group or category of people.
- ✓ Boards may regulate student speech when: (1) it substantially disrupts or interferes with the work of the school or rights of other students; (2) it is lewd, vulgar or profane; or (3) a reasonable observer would view it as school-sponsored and the regulation is justified by a legitimate pedagogical concern.
- ✓ Boards may regulate teachers' classroom expression to accomplish the boards' educational goals and implement the established curriculum. Outside the bounds of school functions, boards may regulate and discipline teacher expression that does not involve a matter of public concern. If the speech addresses a matter of public concern, boards may impose discipline only when the message meaningfully disrupts the orderly business of the district.

ENDNOTES

1. Most other federal civil rights statutes deal with discrimination based on membership in so-called "protected classes" like race, sex or ethnic background. *See, e.g.*, 42 U.S.C. §§ 1981, 1985; Title VII, 42 U.S.C. § 2000e-2. They are beyond the scope of this work, although a grasp of Section 1983 should sensitize board members to the concerns expressed by these other statutes.

2. Kalina v. Fletcher, 522 U.S. 118, 123 (1997).

3. Livadas v. Bradshaw, 512 U.S. 107 (1994).

4. Albright v. Oliver, 510 U.S. 266, 271 (1994).

5. Collins v. City of Harker Heights, 503 U.S. 115 (1992).

6. Texas v. Lesage, 528 U.S. 18 (1999).

7. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

8. *Id.* Who is a "policy maker" for purposes of attaching liability to the school district is a complicated issue, discussed in more detail at pages 32-33.

9. Hafer v. Melo, 502 U.S. 21 (1991); Kentucky v. Graham, 473 U.S. 159 (1985).

10. Owen v. City of Independence, 445 U.S. 622 (1980).

11. *Id.* at 651-53.

12. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

13. *Id.* at 690-91. The Supreme Court clarified that liability can be imposed if the plaintiff suffers harm caused by a constitutional violation for which the governmental entity is responsible. The fact that the governmental agency may be acting in its capacity as an employer rather as than as a governmental power does not absolve it of liability under Section 1983. *Collins v. Harker Heights*, 502 U.S. 1091(1992).

14. City of Canton v. Harris, 489 U.S. 378 (1989); Thelma D. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991).

15. Pembaur v. Cincinnati, 475 U.S. 469 (1986). The question of who has final policymaking authority with respect to the challenged action is to be resolved by the trial judge before the case is submitted to a jury.

16. St. Louis v. Praprotnick, 485 U.S. 112 (1988); Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989); Ware v. Unified School Dist., 902 F.2d 815 (10th Cir. 1990).

17. Daniel v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 457 (1981); Hudson v. Palmer, 468 U.S. 517 (1984).

18. *Id.*

19. Zinermon v. Burch, 494 U.S. 113 (1990).

20. *See, e.g.,* Guardian Assoc. v. Civil Service Comm'n, 463 U.S. 582 (1983) (compensatory damages available for intentional discrimination under Title VI of Civil Rights Act of 1964); Franklin v. Gwinnett County Board of Education, 502 U.S. 60 (1992) (private damages readily available for sexual harassment and abuse of female student by male teacher under Title IX of Education Amendments of 1972); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1100 (amending Title VII of Civil Rights Act of 1964 and Americans with Disabilities Act to permit compensatory and punitive damages for intentional discrimination).

21. Hutto v. Finney, 437 U.S. 678 (1978).

22. Carey v. Piphus, 435 U.S. 247 (1978).

23. Smith v. Wade, 461 U.S. 30 (1983).

24. City of Newport v. Fact Concerts, 453 U.S. 247 (1981).

25. 42 U.S.C. § 1988.

26. Hughes v. Rowe, 449 U.S. 5 (1980).

27. A full discussion of insurance coverage issues is beyond the scope of this work. For a treatment of these issues, *see generally, School Dist. for City of Royal Oak v. Continental Cas.,* 912 F.2d 844 (6th Cir. 1990); *New Madrid School Dist. No. 1 v. Continental Cas.,* 904 F.2d 1236 (8th Cir. 1990); *Board of Educ., Yonkers City School Dist. v. CNA Ins.,* 839 F.2d 14 (2d Cir. 1988).

28. *See, e.g.,* Doe v. Dallas Independent School Dist., 153 F. 3d 211 (5th Cir. 1998)(failure to adopt a formal policy addressing sexual abuse is not actionable under Section 1983 unless deliberately indifferent to the clear likelihood of harm).

29. This discussion focuses on termination or suspension of school employees – two areas where school board members are often involved. At least one court has recognized that a hiring decision may also trigger a Section 1983 claim, in the rare event that adequate scrutiny would lead a reasonable person to conclude that hiring the individual would plainly result in a violation of others' federal rights. *See* Doe v. Hillsboro Independent School Dist., 113 F. 3d 1412 (5th Cir. 1997)(*en banc*).

30. Bishop v. Wood, 426 U.S. 341, 349-50 (1976); *see also* Ferraro v. City of Long Branch, 23 F. 3d 803 (3d Cir. 1994).

31. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). *See also* Swank v. Smart, 898 F. 2d 1247 (7th Cir.), *cert. denied,* 498 U.S. 853 (1990) (admonishing public employers to assure that employees are apprised of all material evidence placed before the body, so that they can meaningfully respond).

32. *Loudermill,* 470 U.S. 532.

33. Gilbert v. Homar, 520 U.S. 924 (1997).

34. County of Sacramento v. Lewis, 523 U.S. 833 (1998); *see also* Albright v. Oliver, 510 U.S. 266 (1994) (declining to base a malicious prosecution claim on substantive due process).

35. Tenney v. Brandhove, 341 U.S. 367, 381 (1951)(Black, J., concurring).

36. Schenck v. United States, 249 U.S. 47, 52 (1919); Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

37. Spallone v. United States, 493 U.S. 265 (1990).

38. Madison Joint School Dist. v. Wisconsin Emp. Relations Comm'n, 429 U.S. 167, 175-76 (1976).

39. Musso v. Hourigan, 836 F. 2d 736 (2d Cir. 1988).

40. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

41. *See, e.g.*, Denno v. School Bd. of Volusia County, 182 F. 3d 780 (11th Cir. 1999)(insufficient prospect of disruption found where student displayed Confederate flag in small-group discussion of Civil War history, student had a hobby of re-enacting Civil War events, and no history of racial disturbances at the school).

42. Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

43. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 261 (1988).

44. Saxe v. State College Area School Dist., 240 F. 3d 200, 206 (3d Cir. 2001).

45. *See generally* Pickering v. Board of Educ., 391 U.S. 563 (1968).

46. Connick v. Myers, 461 U.S. 138 (1983).

47. Harris v. Victoria Independent School Dist., 168 F. 3d 216 (5th Cir. 1999).

48. Bowman v. Pulaski County Special School Dist., 723 F. 2d 640, 644 (8th Cir. 1983); *compare* Ferrara v. Mills, 781 F. 2d 1508 (11th Cir. 1986); Stever v. Independent School Dist. No. 625, 943 F. 2d 845 (8th Cir. 1991).

49. Waters v. Churchill, 511 U.S. 661, 675 (1994); Legal Services Corp. v. Velazquez, 531 U.S. 533, 540-42 (2001); Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229, 235(2000); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 832-34 (1995); Rust v. Sullivan, 500 U.S. 173 (1991).

50. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 261, 267 (1988); Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 47 (1983).

51. Golden State Transit v. Los Angeles, 493 U.S. 103 (1989).

52. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

53. Smith v. Robinson, 468 U.S. 992, 1005, n. 9 (1984); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). The burden rests with the defendant to persuade the court that one of the exceptions exists. *Golden State Tran*sit, 493 U.S. at 107.

54. 122 S.Ct. 2268 (2002).

55. 20 U.S.C. § 1400 *et seq.*. The federal courts are divided on whether a Section 1983 claim may be brought for violation of this statute. *Compare W.B. v. Matula*, 67 F. 3d 484 (3d Cir. 1995)(recognizing cause of action), with *Sellers v. School Board*, 141 F. 3d 524 (4th Cir. 1998)(not recognizing cause of action).

56. 42 U.S.C. § 290ee-3.

CHAPTER 4

Legal Defenses Against Liability

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As society becomes increasingly litigious, school districts are facing more and more lawsuits. But under certain circumstances, the law protects the school board as an entity and its members from legal liability. This chapter provides an overview of some of these defenses and discusses when they might apply. Whenever school boards or their members are sued, it is imperative that they immediately contact a competent school attorney. It is the attorney's responsibility to raise those defenses that best protect the board and its members.

PROCEDURAL DEFENSES

Timing and Notice Safeguards

Regardless of the merit of a claim, that claim will not go forward in court unless the plaintiff complies with all court procedures. These procedures guarantee that those who are sued have a fair opportunity to defend themselves. Failure to comply with these procedures will often result in the dismissal of the plaintiff's claim. Three of these procedural requirements, known as the statute of limitations, laches, and notice of claim, safeguard school boards and their members.

- **Statute of Limitations**

A school board or its members may defend against a lawsuit by asserting that the plaintiff got to the courthouse too late. Whether the claim is filed in federal or state court, it must generally be filed within a certain time period, called the statute of limitations. If a plaintiff fails to file his or her claim within the time period specified, he or she will be out of court. The proverbial clock for filing a claim generally begins to tick when the alleged injury occurs or when the person suing had reason to know about the injury.

States set their own statutes of limitations for claims based on state law. The time period may differ depending on the type of claim. For example, most states have distinct statutes of limitations for contract claims and tort claims. They may even set different time periods for different types of contract or tort claims. Thus, before anyone can determine what statute of limitations applies, the type of claim must be identified. Additionally, for claims that do not have their own applicable statute of limitations, states have a "catch all" provision that prescribes the time limit for filing.

SPECIAL TIME LIMITS FOR CLAIMS AGAINST GOVERNMENT OFFICIALS

Many states have also enacted "special" statutes of limitations that give plaintiffs less time to bring tort claims against government officials. For example, in Illinois, the Local Government and Governmental Employees Tort Immunity Act provides that actions brought against a public official must be brought within one year of the date the injury occurred.[1] But these "special" statutes may not apply in certain circumstances. For example, Illinois law allows minors who were injured before they turned 18 to sue for their injury within two years of their eighteenth birthday.[2] This minors provision has been interpreted to override the shorter one year period applicable to tort claims brought against school boards or their members.[3]

Claims based on federal laws may have their own statutes of limitations set by Congress. Plaintiffs cannot come into federal court if they have filed their claims after the applicable time limit has expired. These limits are strictly enforced,[4] so that a plaintiff who files even one day late may be prevented from seeking relief. Generally, if Congress did not specify a statute of limitations for a particular kind of claim, a court will apply a state statute of limitations. In *Chambers v. Omaha Public Schools,*[5] the Eighth Circuit Court of Appeals held that courts must apply the state statute of limitations most analogous to the federal claim. In determining which state time period to apply, the court may select the limitations period that best effectuates the federal policy underlying the claim.[6] An example of a type of claim that borrows its statute of limitations from state law is a civil rights action under 42 U.S.C. § 1983.[7] (See Chapter 3 for more discussion of Section 1983 claims.)

- **Laches**

School boards and their members may also be able to protect themselves from legal claims by using a defense called laches. The defense of laches says that if a plaintiff's lack of diligence causes an undue delay in litigation that prejudices the defendant, then the plaintiff forfeits his right to assert the claim.[8]

While both laches and statutes of limitations defenses hinge on the lapse of time, the defenses are distinct. The difference between the two defenses is simple: a claimant will be barred by the statute of limitations merely because the time allotted to bring the claim has lapsed, while the laches defense will only be successful if the delay prejudices the party claiming the defense. No specific time limit exists for the defense of laches; consequently, the defense of laches may be available before the time period for the statute of limitations expires or even after the lawsuit has started. For example, a plaintiff might file a claim and then do nothing else for an extended period of time. If this delay inhibited the school board from actively preparing its defense by letting too much time pass, making evidence and witnesses unavailable, the board could raise laches as a defense. Another illustration involves a claimant who allows the school board to believe he or she will not pursue his or her claim. Relying on that belief, the school board does not prepare for litigation. Then, the claimant litigates anyway.

A school board or its members may use the defense of laches even if the applicable statute of limitations period has not expired. The delay in litigation need not exceed this statutory period. As explained above, a school board or its members need only show that a delay in the litigation prejudiced them in the defense of their case.

- **Notice of Claim**

Before filing suit, a claimant must notify the school board that he intends to do so. This "notice of claim" is required to allow local government officials the opportunity to conduct a prompt investigation of the injury while the matter is fresh and witnesses are available. Furthermore, the requirement discourages litigation by allowing government officials to assess liability and make prompt settlements, thus avoiding the overwhelming costs of lawsuits.[9] While most courts have upheld the constitutionality of these state statutes, a handful of cases have invalidated them, finding that they violate the Equal Protection or Due Process Clause.[10]

The requirements in notice of claims statutes vary from state to state. Generally, these statutes set the length of time allowed for giving the board notice, the information to include in the notice, the method to provide the board with notice, and the person to whom the notice must be delivered. The information that must be included in the notice is generally the time and place of the occurrence causing the injury, monetary damages demanded, plaintiff's address, etc. Failing to meet any of these requirements may prevent the claimant from suing the board, but in some states, a court may still allow a lawsuit to proceed if the plaintiff has "substantially complied" with the requirements. Other states explicitly excuse a minor or mentally incompetent claimant from notice of claim requirements.

Exhaustion of Remedies

In certain circumstances, individuals cannot sue a school board or its members without first pursuing other methods of resolving their dispute. In other words, the complainant must "exhaust" other remedies before coming into court. If he has not, the school board can raise an "exhaustion of remedies" defense. The requirement to seek other avenues of relief before filing a lawsuit may be imposed by statute or by contract.

An example of a contractual exhaustion of remedies requirement is a collective bargaining agreement provision under which covered employees agree to resolve their discrimination claims against the district through a grievance procedure. The agreement frequently specifies the procedures, including how to file a grievance, who will decide the outcome, time limits and whether the employee and district will be bound by the decision. Sometimes agreements may mandate that the parties use arbitration or mediation to resolve disputes. This is a common provision in school construction contracts. Again, the agreement often will dictate the procedures, the outside arbitrator or mediator to be used and the binding nature of any decision. In both cases, these contractual provisions may be used by a school board to prevent, or at least postpone, a lawsuit brought by someone who had previously agreed to try something else before coming to court.

Statutes may also impose exhaustion of remedies requirements that compel a complainant to use administrative procedures to resolve a dispute before filing a case in court. A prime example is the Individuals with Disabilities Education Act (IDEA),[11] the federal law requiring school districts to provide a free appropriate public education to certain students with disabilities. IDEA grants parents and students certain procedural protections. Among these protections is the right to dispute the special education placement and related services offered or provided by a public school district. In general, parents cannot go directly to court if they are unable to obtain the placement and services they want for their child; they must first try to resolve the disagreement by "exhausting" the administrative remedies made available to them by the state. These include a due process hearing before an impartial hearing officer and at least one level of administrative appeal. If the parents try to skip these steps and sue the district directly, the district can assert that the court should not hear the case until after the parents have sought relief through the administrative proceedings and remain unsatisfied with the result.

SUBSTANTIVE DEFENSES

Other types of protection from liability do not turn on whether the plaintiff has followed the proper procedures in suing the board or its members. Known as substantive defenses, these legal shields are available to protect the board in carrying out its governmental function of providing education or in its capacity as a public employer.

Immunities

- **Eleventh Amendment**

The Eleventh Amendment to the U.S. Constitution prohibits lawsuits in federal and state court against a state and its agencies unless the state consents.[12]

ELEVENTH AMENDMENT

The amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Unfortunately, local government bodies, including school boards, do not enjoy the same shield from liability under the Eleventh Amendment that states do. School boards have long taken the stance that they are arms of the state, but the Supreme Court has disagreed. In *Mt. Healthy School District Board of Education v. Doyle*,[13] the Court, looking at state law and the actual operation of a local school district, held that the district was more like a county or a municipal corporation than an arm of the state, and therefore the Eleventh Amendment did not "immunize" it from being sued. However, in at least one state (California), school boards are deemed arms of the state and therefore have Eleventh Amendment protection.[14]

- **Sovereign Immunity**

While school boards do not enjoy the protection of the Eleventh Amendment, they are generally protected from tort liability under a concept known as sovereign immunity.[15] (See Chapter 2 for more information about tort liability.) The underlying theory is that school boards act as agents or instrumentalities of the state in the performance of a governmental function for which the state is primarily responsible.[16] Thus, in most states, a school district is immune from liability for acts taken to fulfill its governmental function of providing public education.[17] This protection applies to the school board as an entity and to individual members of a school board sued in their official capacity. It does not shield individual board members sued personally for acts outside their official functions. School board members should also be aware that some states have limited or removed this governmental immunity either in whole or in part through court decisions or by legislative or constitutional amendments.

SOME STATES LIMIT SOVEREIGN IMMUNITY[18]

By Court Decisions	By Statutory or Constitutional Amendments		
Arizona	Alaska	Michigan	North Carolina
Illinois	California	Minnesota	Oregon
Minnesota	Connecticut	Mississippi	Washington
Nebraska	Illinois	Nevada	Wisconsin
Nevada	Kentucky	New Jersey	
New Jersey	Louisiana	New York	

- **Personal Immunities**

While neither the Eleventh Amendment nor sovereign immunity protects individual school board members from being sued in their personal capacity, other types of immunities may help shield them from liability in federal cases.

Absolute Immunity. The first type, absolute immunity, prevents a person whose federal rights might have been violated by certain government officials from obtaining any type of remedy, regardless of the official's conduct.[19] Government officials protected by absolute judicial immunity include judges performing judicial acts within their jurisdiction, prosecutors in the performance of their official functions and certain "quasi-judicial" agency officials who perform functions similar to judges or prosecutors in a setting similar to court. Absolute immunity shields these government actors so that they can exercise independent judgment without the threat of lawsuits.[20] School board members functioning in an adjudicative manner in a student discipline setting have not had much success convincing courts that their activities are quasi-judicial and entitled to the shield of judicial immunity. Another form of absolute immunity that school board members may be able to use to protect themselves is legislative immunity. To take advantage of this protection, school board members would have to show that their policymaking activities are in fact, legislative, rather than administrative.[21]

Qualified Immunity. Qualified immunity may shield individual school board members from liability in Section 1983 cases for the performance of discretionary acts. School board members are entitled to this protection unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known at the time of the conduct in question.[22] If the law was not clearly established, then the school board member could not be expected to know that the law forbade the particular conduct and so would be entitled to qualified immunity. Courts will deny the defense if the law was clearly established, because public officials are expected to know the law applicable to their jobs. To get the protection, it is not enough that the board member acted in good faith.

The Supreme Court in *Harlow v. Fitzgerald* lists reasons why the law grants qualified immunity. First, litigation against public officials is costly. Not only does litigation cost the taxpayers money to defend, but it diverts official energy away from public issues. Second, without qualified immunity, people will be deterred from seeking public office. Finally, the fear of being sued may dampen the discharge of duties by public officials.[23]

Immunity Under the No Child Left Behind Act. This law expressly limits the financial liability of school board members (but not school boards) arising out of efforts to maintain discipline and order in schools consistent with local, state and federal law. Dubbed the Paul D. Coverdell Teacher Protection Act of 2001,[24] this statute also limits the liability of teachers, administrators, and any other employees responsible for maintaining safety or discipline for harm they may cause while acting on behalf of the school in disciplining students or maintaining classroom order.

Protection from liability will not be available for harm caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed. Moreover, there will be no shield from liability if the school board member caused harm while operating a vehicle, vessel, or aircraft for which the operator must maintain a license or insurance. Finally, no protection from liability exists if the harm caused was a crime of violence, act of terrorism or sexual offense for which the school board member was convicted, a state or federal civil rights violation, or a harmful act that occurs while the school board member is under the influence of drugs or alcohol.

The statute also protects board members from punitive damages (damages awarded above the loss sustained to punish the wrongdoer) if they are found liable for harm. The plaintiff can wipe out this protection by clear and convincing evidence that the harm was caused by the school board member's willful or criminal misconduct or conscious, flagrant indifference to the rights or safety of the individual harmed.

This statute is intended to preempt inconsistent state laws. However, the statute allows a state to determine whether board members will be entitled to this protection in civil actions in state court arising out of an action within that particular state.

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Other Substantive Defenses

- **Section 1983**

School boards, like other agencies of local government, do not enjoy any immunity, absolute or qualified, from suits brought under Section 1983. If a plaintiff can successfully establish that a policy or official act of the school district violated his/her constitutional rights, the entity may be held liable under Section 1983 even if the law was not firmly established. Nor will the board be protected from liability by the good faith of school officials or employees.[25]

Depending on the type of claim asserted, school boards may be able to defend against liability under Section 1983 by asserting:

- the harm alleged was not caused by a violation of constitutional or federal statutory rights;
- the act was not carried out in accordance with an official policy or custom;
- the school district's action was reasonable under the circumstances, i.e., it was not deliberately indifferent;
- the district employee was not someone with "final policymaking authority;"
- the statute does not grant an enforceable right; or
- Congress foreclosed suits under section 1983 by providing a comprehensive remedial scheme in the statute itself.

In addition to these general defenses to liability under Section 1983, the board may be able to raise defenses that respond to the basic elements of the specific claim. For example, Chapter 3 discusses procedural due process claims and free expression claims as common grounds for cases brought under Section 1983. Some typical defenses to these claims are described on the next page:

COMMON DEFENSES TO CONSTITUTIONAL CLAIMS

Procedural Due Process

- Employee has no property interest in continued employment;
- Board's action was not severe enough to amount to a deprivation of a property interest; and,
- Procedures afforded the employee satisfy constitutional requirements.

Free Expression

- Valid time, place or manner regulation;
- Forum where the expression took place is closed;
- Speaker's form of speech is not protected by the First Amendment;
- Employee's speech is not on a matter of public concern;
- Regulation of student's speech is justified by a legitimate pedagogical concern or need to avoid disruption.

• Statutory or Common Law Defenses

School boards and their members may also raise substantive defenses that have been established by common law (system of law based on universal consent and long term usage rather than express statutes) or by specific statutory provisions.

State Tort Law Claims. Below are some common defenses that school boards and their members may use to avoid or limit liability for tort claims.

▶ Tort Immunity Provisions Some states have recognized in statutory provisions the concept of sovereign immunity (see page 61) against claims based on state tort law. As noted above, some states have limited this protection to governmental actions or those that are discretionary, so that actions

that are proprietary or ministerial may subject the board and its members to liability. Other states may list specific actions that do not enjoy the general grant of immunity. Many states have removed or reduced the protection of tort immunity up to particular dollar limits or to the extent of insurance coverage. Some states provide indemnification of board members found personally liable for actions taken within the scope of their authority that are not wanton, reckless or malicious. This indemnification generally includes costs of defending the board member.

- Failure to State a Claim If a plaintiff fails to allege (and subsequently prove) facts that establish the necessary elements of a claim, the board or its members may raise the defense that the complaint does not amount to a claim recognized by the law. For example, if the claim is based on negligence, the plaintiff must assert facts that show that the board had a duty that it breached which resulted in an injury to the plaintiff. If the plaintiff does not, his claim may fail.

- Assumption of the Risk This defense may be used when a plaintiff knowingly and voluntarily accepts the risks when he enters into an activity or situation. In such cases, the board may contend that he should not be allowed to recover for injuries caused by those known risks. This defense depends on showing that the plaintiff voluntarily assumed all the risks because they were either apparent or explained to him.

- Contributory and Comparative Negligence A few states will deny a plaintiff recovery on a negligence claim, if the plaintiff has been negligent and caused any part of his/her own damages. Recognizing that this all or nothing approach often results in severe consequences, many states have moved to the less severe system of comparative negligence. Comparative negligence apportions the damage award among the negligent parties depending on the level of fault or their contribution to the injuries. For example, if the plaintiffs caused 10% of his injuries, his damage award would be reduced by 10%.

Federal Statutory Claims. School boards and their members may be sued for violating federal statutes that grant individuals certain civil rights. Sometimes these claims may be brought under Section 1983. But if the statute provides its own scheme of remedies, plaintiffs may not be able to use Section 1983 but must pursue the claim under the law itself. These statutes may provide specific defenses that school boards may be able to use to avert liability. Thus, whenever the board is charged with violating a person's rights under a federal statute, the board's attorney should determine if any of the explicit defenses apply. Following are two examples:

- Americans with Disabilities Act Defenses The Americans with Disabilities Act[26] (ADA) prohibits discrimination on the basis of disability in employment and provision of public services. School boards can defend against an ADA claim by asserting that the plaintiff is not entitled to the law's protections because he does not have a disability that fits the statutory definition. For example, he may have a disability but the limitations it imposes are not substantial and do not affect a major life activity. This lack of coverage defense is a common one raised under many other statutes besides the ADA. Other ADA specific defenses include the need to prevent a "direct threat" or "significant risk" to the health and safety of others, the practice is job-related and consistent with business necessity, the requested accommodation would impose an undue hardship on the operation of the schools, and the need to comply with other federal laws.

- Title VII Defenses Title VII of the 1964 Civil Rights Act[27] prohibits employers, including school districts, with fifteen or more employees from discriminating on the basis of race, color, religion, gender, or national origin. It covers both intentional discrimination (disparate treatment) and actions that have a disproportionate adverse effect on members of a protected class (disparate impact). A school district can defend against a claim that an employment practice has a discriminatory impact by showing that practice is job-related, consistent with business necessity and there is no less discriminatory manner for meeting the business objec-

tive. Business necessity cannot be used to justify intentional discrimination. In cases alleging discrimination on the basis of religion, gender or national origin, a school district may be able to protect itself by showing that the practice was a bona fide occupational qualification. In cases of sexual harassment that do not result in significant changes in the employment status of the plaintiff, the board may be able to defend itself by asserting that it took reasonable care to prevent and promptly correct any harassing behavior and that the harassed employee unreasonably failed to take advantage or the preventive or corrective measures provided by the district.

CONCLUSION

When a school board or its members are sued, they should not panic. Our legal system affords many safeguards that protect government officials, including school boards and their members, from liability. But effectively using these safeguards requires the board and its members to seek the advice and assistance of a competent school attorney not only when a lawsuit arrives on the doorstep but more importantly, in the regular business of carrying out their public function. By getting good legal advice before problems arise, the board protects itself with the surest defense—prevention.

CHECKLIST OF DEFENSES AGAINST LIABILITY

Whenever school boards or their members are sued, they should immediately contact a competent school attorney. The attorney should advise the board about possible defenses to liability. Some of the defenses that may be available are listed below:

Procedural Defenses

✓ **Statute of Limitations**—Plaintiff got to the courthouse too late. Time periods for filing claims are generally set by statute. A plaintiff who files late may be prevented from seeking relief.

✓ **Laches**—Plaintiff took so long that the board cannot fairly defend against the claim. If plaintiff does not diligently pursue his claim, he may forfeit the right to obtain relief.

✓ **Notice of Claim**—Plaintiff failed to notify the board of his intent to sue. Statutes set length of time allowed for notifying the board, the information that must be included in the notice, the method to provide notice and the person to whom the notice must be delivered. Failure to meet any of these requirements may prevent the claimant from suing the board.

✓ **Exhaustion of Remedies**—Plaintiff did not pursue mandatory methods of resolving the dispute before filing a lawsuit. The requirement to seek other avenues of relief before coming to court may be imposed by statute or contract. If plaintiffs try to skip these steps, the board can ask the court to refuse to hear the case until after the other remedies have been "exhausted."

cont'd

Substantive Defenses

✓ **Eleventh Amendment**—This constitutional amendment prohibits lawsuits in federal and state court against a state and its agencies unless the state consents. This "immunity" from being sued does not generally apply to school boards (except in California).

✓ **Sovereign Immunity**—School boards and their individual members are generally immune from liability for acts taken to fulfill their governmental function of providing public education. Some states have removed or limited this governmental immunity in whole or in part.

✓ **Personal Immunities**—In federal cases individual board members may be able to assert absolute immunity on the basis that their actions were quasi-judicial or legislative. In Section 1983 cases, board members may be entitled to qualified immunity where their discretionary acts did not violate clearly established constitutional or statutory rights of which a reasonable person would have known. Board members are also protected by the No Child Left Behind Act from liability for acts taken to maintain discipline and order in schools.

✓ **Section 1983 Defenses for Boards**—Boards as public entities do not have immunity in Section 1983 cases but may raise other defenses against liability including: (1) no violation of a federal or constitutional right occurred; (2) the act was not in accordance with official policy or custom; (3) the district's action was reasonable under the circumstances; (4) the district employee was not a final policymaker; (5) statute does not grant an enforceable right; or (6) Congress foreclosed Section 1983 suit by providing comprehensive remedial scheme in statute.

cont'd

✓ **State Tort Claim Defenses**—Some common defenses are:

▶ Tort immunity statutes—State law protects boards and their members from this type of claim.

▶ Failure to state a claim—Plaintiff's allegations do not amount to a claim recognized by the law.

▶ Assumption of the risk—Plaintiff knew about and accepted the risks involved in the situation or activity

▶ Contributory or comparative negligence—Plaintiff contributed to his own injuries and so should be wholly or partially responsible for resulting damages.

✓ **Federal Statutory Claims**—Whenever the board or its members are charged with violating a person's rights under a federal statute, the statute itself should be reviewed to determine if it supplies any specific defenses. A common defense based on statutory definitions is that the plaintiff's claim simply is not covered by the law.

Best Possible Defense

✓ **PREVENTION!**

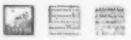
ENDNOTES

1. 745 ILL. COMP. STAT. 10/8-11.
2. 735 ILL. COMP. STAT 5/13-211.
3. Bertolis v. Community Unit School Dist. No. 7, 671 N.E.2d 79 (Ill. App. Ct. 1996).
4. 1 WEST'S FED. ADMIN. PRAC. § 810.
5. 536 F.2d 222 (8th Cir. 1976).
6. *Id.*
7. Wilson v. Garcia, 471 U.S. 261 (1985).
8. The Supreme Court articulated a two-part test to determine if laches exists. First, laches requires proof of a lack of diligence by the party against whom the defense is asserted. Second, laches requires proof of prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265 (1961).
9. 10 AM. JUR. 2d *Public Officials* § 221.
10. *See, e.g.*, Whitfield v. Roth, 519 P.2d 588; Wilson v. District of Columbia, 338 A.2d 437; Housewright v. La Harpe, 282 N.E.2d 437; Foster v. County Comrs., Morgan County, 325 N.E.2d 223; Lunday v. Vogelman, 213 N.W.2d 904; Brantley v. Dallas, 498 S.W.2d 452; Gallegos v. Midvale City, 492 P.2d 1335.
11. Nevada v. Hall, 440 U.S. 410, 414 (1979).
12. RICHARD S. VACCA, LIABILITY OF SCHOOL OFFICIALS AND ADMINISTRATORS FOR CIVIL RIGHTS TORT 34 (1982).
13. 429 U.S. 274 (1977).
14. Belanger v. Madera Unified School Dist., 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 507 U.S. 919.
15. 33 A.L.R. 3d 703.
16. *Id.*
17. 18 MCQUILLAN MUNICIPAL CORPORATIONS § 53.05.30 (3rd ed. 1993).
18. *Id.*
19. O'Neal v. Mississippi Bd. of Nursing, 113 F.3d 62 (5th Cir. 1997).
20. 4 TREATISE ON CONSTITUTIONAL LAW § 19.29 (3d ed.).
21. Bogan v. Harris, 523 U.S. 44 (1998).
22. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

23. *Id.* at 814.
24. 20 U.S.C. § 6731.
25. Owen v. City of Independence, 445 U.S. 622 (1980).
26. 42 U.S.C. § 12101 *et seq.*
27. 42 U.S.C. § 2000e.

CHAPTER 5

Minimizing Liability



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It is a rare school board or school district that does not eventually become involved in a liability claim of some sort. Interaction with students, parents, and the public often sets the stage for possible claims against the board for a perceived wrongful act. While a board may always believe it is acting in the best interests of the district, those that disagree will frequently respond with litigation, or at least, the threat of litigation. If steps are not taken to minimize liability, both before a claim occurs and after a claim is filed, the district can suffer significant financial loss as well as disruption among employees and students. Difficulty securing liability coverage, not to mention public relations problems, may also result from a bad claims experience. The old adage, an ounce of prevention is worth a pound of cure, is key to avoiding, or at least minimizing these problems.

ADOPT AND IMPLEMENT SOUND POLICIES

Not surprisingly, the business of education can be very emotional. Inevitably, someone is not going to like something that the district is doing, or on the flip side, not doing. While the board cannot please everyone all the time, it can provide consistent leadership that ensures sound policies and procedures are adopted and followed.

The most important step a board can take to minimize liability is to have clearly stated policies addressing how the board and the district employees will respond to various issues such as student

discipline, drug testing, employee termination, and sexual harassment, to name a few. If written policies address all aspects of district business and are consistently followed, the risk of liability can be significantly reduced. Recognizing areas of potential liability and providing supervisors and employees clear direction on how to handle difficult issues can help show that the board has made diligent efforts to comply with state and federal statutes, regulations, guidelines and rulings that affect the district's operation.

Most districts already have a set of policies in place to guide the board and staff. Also, many state school boards associations offer a policy service that provides sample policies for districts to consider as well as updates necessary to reflect changes in public and legal mandates. In general, policies should cover several broad categories of district operation.

POLICY CATEGORIES

- Local Governance
- Business and Support Services
- Personnel
- Instruction
- Students
- Community and Governmental Relations

Identify Key Policies To Minimize Liability

Within each of the broad categories listed above are specific issues for which policies should clearly address district philosophy, requirements, processes and procedures. While every district may take a different approach toward each of these, having a stated policy may help to prevent future problems. The following list, though not exhaustive, highlights certain areas that tend to invite litigation:

KEY POLICIES CHECKLIST

Personnel

- ✓ Termination
- ✓ Sexual harassment
- ✓ Student/teacher relationships
- ✓ Electronic communication/privacy
- ✓ Employee complaints/grievances
- ✓ Employee leave
- ✓ Confidentiality agreements
- ✓ Hiring practices
- ✓ Background investigations
- ✓ Performance appraisals
- ✓ Religion in schools
- ✓ Open records
- ✓ Contracts
- ✓ Reporting child abuse/neglect

Students

- ✓ Drug testing
- ✓ Dress codes
- ✓ Electronic communication/privacy
- ✓ Corporal punishment
- ✓ Student discipline
- ✓ Weapons
- ✓ Alcohol, tobacco, drug use
- ✓ Sexual harassment
- ✓ Safety requirements
- ✓ Religion in schools
- ✓ No pass/no play rules
- ✓ Student publications
- ✓ Students with disabilities
- ✓ Student transportation

Governance

- ✓ Posting of meetings
- ✓ Electronic communication/ privacy
- ✓ Open records

Instruction

- ✓ Religion in schools
- ✓ Students with disabilities

Community

- ✓ Parent/student complaints
- ✓ Use of school facilities
- ✓ Visitors to schools

Business

- ✓ Bidding practices
- ✓ Electronic communication/ privacy
- ✓ Safety requirements
- ✓ Contracts

Some Examples

- **Background Investigations**

A policy requiring background investigations of potential employees, such as bus drivers, may lessen the chance the district will place an undesirable individual in a position involving contact with children. A background investigation policy should state at a minimum the positions for which an investigation is necessary and who will review the results. The policy should also specify the sources that should be checked for each position. For example, the district may require that investigations of bus driver applicants include employment history verification, personal reference checks, review of national and state criminal records and inspection of department of motor vehicle records. It is important that all background check policies comply with applicable state and federal requirements.

- **Student Discipline**

Corporal punishment and student discipline are another area of potential liability. Many districts prohibit corporal punishment even if state law allows it. These districts have decided that the potential for claims alleging assault and/or violation of civil rights is too high when corporal punishment is allowed. Where corporal punishment remains permissible, the district should have a policy that requires witnesses to the punishment as well as guidelines controlling how it is administered. Many districts also require parental permission before corporal punishment can be used.

Student discipline that does not involve physical force can still be a source of potential liability. Discipline policies should state how and when punishment for offenses will be applied. For example, a policy clearly setting forth the circumstances under which a student will be sent to an alternative education program may become critical to defending a claim alleging that the assignment violates the student's civil rights. As in many other areas, school boards must ensure that the district's discipline policies are well known and understood by students and staff.

Confront Controversial Issues

Adopting policies on controversial or sensitive issues may often be an uncomfortable and contentious process, but it is necessary. Some of the "hot" topics with which a board may have to contend include drug testing, school prayer, dress codes, use of school facilities, gay rights, commercialization of schools, privatization and race-based student assignments. While adopting, implementing and enforcing such policies can be a difficult task for a board, the consequences of not addressing such issues can be much worse. Without a consistent policy and process for handling these topics, the potential for legal liability skyrockets.

LEGAL ADVICE MAKES BETTER POLICIES

To some school boards, routine legal advice is an unaffordable luxury. To others, it is an unwanted nuisance. Whatever the school board's view, the fact is that "preventive lawyering" is by far the most economical approach in the long run. This is especially true in the area of policy making.

Since the school board and the superintendent control their own agenda, there should rarely be a need to make seat-of-the-pants decisions while developing policy on issues with serious legal implications. The time to seek legal advice is before a controversial proposal reaches the action stage. Once reduced to paper or distributed in a public agenda, proposed actions develop a life of their own. Input from counsel before this stage will help assure policies and other board decisions are not weighed down with legal problems that will only serve later as grist for the litigation mill. Legal advice is important not only when the board is considering adoption of new policies but also in helping the board to interpret and apply policies consistently and in reviewing and recommending changes to existing policies.

Source: D. Rubin, School Board Member Liability Under Section 1983 (NSBA 1992).

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TRAIN EVERYONE

Obviously there are dozens of scenarios involving all of these policy topics that could lead to litigation. But having policies will protect the district only if they are consistently followed. The actual practices of the district must match the policies. This requires comprehensive and continuous training of many members of the school community. For example, if the district has a policy forbidding corporal punishment, then lawsuits for assault and battery due to an overzealous paddler will be avoided only if the policy is followed. Obviously, to follow the policy a principal or teacher must be aware of and understand the policy both in principle and practice. They must be advised that ignoring the policy is not an option and that doing so will have disciplinary consequences. If a district allows individual campuses to make their own policy decisions, extra care should be taken to ensure conflicts between a campus and the board are not created.

Train Board Members

It is important that all school board members be well versed in their authority and responsibilities as they act in the course and scope of their board member duties. Liability from board actions can result from blatant violations of civil rights as well as something as innocent as unintentionally creating a quorum. At the very least, all board members must be knowledgeable about and act in accordance with any state and federal laws that govern when, where, and how board members may meet, posting of meetings, due process requirements and civil rights. These are all areas that can give rise to claims if the board does not act appropriately.

Some states require elected board officials to have a certain number of hours of certified training per year. This training may include everything from the fiduciary responsibility of the board members, to policy-making processes, to financial management. This training should be a priority for all board members so that they can effectively and properly govern the district. Current records should be maintained of each board member's training so that they can be produced in the event documentation of the training is ever needed. It is also imperative that board members understand that they must act at all times in the best interests of the district and

never for personal gain. Promoting personal interests in the course and scope of board member responsibilities may give rise to claims against the district and the individual board member, as well as jeopardize any insurance coverage the district may have under a liability policy.

Train Staff and Administrators

Documented training must also be provided to all district staff and administrators. Awareness of district policies must be mandatory at all levels. This training should make clear that district policies must be followed and not simply sit in a notebook on a shelf somewhere. Good training will include how to put the policies into practice.

Districts can improve the chances that they will prevail in lawsuits that do arise when they can show that they adopted sound policies and procedures that were consistently followed. Following proper procedures can help convince a court that the district acted with fairness. But a district that does not train staff about its policies or allows staff to ignore policies and procedures runs the risk of being held negligent or being found "deliberately indifferent" to misconduct.

Some districts might wonder what kind of specific training should be provided. The best rule to follow is that there's no such thing as too much training. Some key training areas include sexual harassment (employee and student) policies, discipline practices, hiring practices, student transportation rules (for example, when and where students can exit a bus), investigating employee complaints, and giving performance appraisals, to name a few. But all policies, regardless of topics or issues, should be impressed upon all employees.

While much will be the same, some aspects of training should differ according to the roles and responsibilities of those being trained. For example, sexual harassment training should be mandatory for board members, administrators and staff, though the training sessions would not all have the same focus. Board member training might include information on relevant state and federal laws and regulations and what an effective policy should contain. Administrators might learn how to establish thorough complaint and investigation procedures and the need to publicize the district's

sexual harassment policy as widely as possible. Staff might be trained on how to recognize sexual harassment and how to use the district's reporting procedures.

All training sessions should be documented for every employee. Follow-up training should be provided periodically to demonstrate the district's continued diligence in ensuring widespread compliance with its policies. If the district does not have the staff or expertise to conduct training on its own, it should contract for training services from knowledgeable professionals. The important point is that board members and employees must be well informed about what the law and district policies require and expect them to do.

INVESTIGATE COMPLAINTS AGAINST THE DISTRICT

Even though a district has clearly stated policies and has provided appropriate training, complaints may still arise. In this case, the first step to limiting liability is to investigate the complaint promptly and then take appropriate corrective action, if necessary. For example, if an employee files a complaint alleging sexual harassment, it is critical that the district investigate the allegations thoroughly. Immediate response to the complaint as well as appropriate corrective action will provide some protection for the district if a lawsuit is actually filed. Court cases have found that employers who promptly act on a complaint can spare themselves from hefty damage awards.

While it is the school board's responsibility to adopt a policy requiring prompt investigation of complaints, most likely an administrator will oversee, if not conduct, the investigation. In this instance, as in many others, the board should recognize that its function is not to run the schools but to see that they are well run. Board members' involvement in the nitty gritty of daily school district administration raises obvious management problems. Management issues aside, the liability of the board and its members increases with the scope of their activity and depth of involvement. By permitting the administration to deal with problems through established procedures, the board will increase the likelihood that action will be taken first by those most knowledgeable of the facts and closest to the scene. Involvement by board members before this process runs its course poses a threat of ill-considered action by those with the least knowledge and farthest removed from the action.

SECURE APPROPRIATE INSURANCE COVERAGE

When purchasing liability coverage, it's important to purchase the right policy. There are different types of liability insurance that a board should secure, including general comprehensive liability, fleet liability, errors and omissions liability and umbrella coverage. Because policies are referred to by different names such as legal liability, educators' liability, employment liability, and E & O, a board needs to understand clearly what its liability coverage provides, including the conditions and exclusions. Before purchasing a policy, a board should ask questions about coverage and what triggers a claim. (See box on page74 for more questions to ask.) A board does not want to find out what its coverage is, or isn't, after a suit has been filed. To avoid future coverage difficulties, a board is well advised to consult a competent attorney or risk management professional when purchasing insurance.

Once a district receives a claim, district staff and board members must cooperate fully with the district's liability carrier so as not to jeopardize coverage. If a district is served with a lawsuit, the board should notify the carrier immediately and forward the legal documents both to the carrier and the board's attorney. Lawsuits come with deadlines attached, making timely response imperative to prevent a default judgment. Many carriers will also accept an incident report that warns of potential litigation. This will protect a district from coverage problems involving timely filing issues if the coverage is on a claims-made basis. A district should never admit any liability, no matter what type of claim is filed. Also, it should never make any payments voluntarily, nor incur any expenses, such as legal fees without the carrier's consent. Most carriers will not pay any expenses that a district has incurred on its own and may reserve the right to select counsel to defend the claim.

KEY INFORMATION TO ASK ABOUT INSURANCE POLICIES

✓ Types of claims covered
✓ Specific exclusions—Athletic competitions, transportation of students, environmental impairments, facilities use, corporal punishment, product liability, defamation, completed operations, teachers' professional liability, health care workers' professional liability, and/or civil rights actions are common exclusions. Are riders available to cover the excluded claims?
✓ Coverage amounts for each type of claim, including any policy caps
✓ Definition of insureds—board members, all employees, student teachers, volunteers?
✓ Definition of loss—does it include cost of defending the claim as well as any judgment awarded?
✓ Definition of claim—are administrative hearings covered?
✓ Coverage for criminal acts—if the insured is exonerated from a criminal charge, will the policy reimburse defense costs?
✓ Coverage for non-pecuniary relief—even if no damages are sought, will the policy cover defense costs?
✓ Prior acts coverage—will the policy cover claims made for acts that occurred in a prior policy period?
✓ Selection of defense counsel—what control does the insured have in selecting the attorney who will defend the claim?
✓ Settlement of claims—must the carrier obtain the insured's consent before settling a claim?
✓ Policy period
✓ Notice of cancellation—how much notice will the carrier provide the insured before canceling coverage?
✓ Discovery period—will the carrier allow the insured to purchase coverage that would apply to any claim brought against the insured within X months of policy termination, provided the act giving rise to the claim occurred during the original policy period?

Source: G. Thune, School District's Insurance Program—Special Problems for School Attorneys, School Law in Review (NSBA 1987).

OTHER STEPS TO TAKE ONCE THE BOARD IS SUED*

Choose Battles Carefully

Part of a policymaker's role is to balance matters of principle with sound business judgment. When this balancing act occurs on a sensitive issue of public concern in an emerging area of the law, secure competent legal advice early about the risks and expense of litigation. Remember it is not merely whether the board member or district can afford to capitulate or lose. Consider also the cost of winning.

Choose Qualified Trial Counsel

To the extent allowed by its insurance policy, the board and the district should arrange when sued to be defended by competent trial counsel with relevant experience. The services of an experienced trial advocate whose firm has the research capabilities to keep abreast of the changes in school law are a must.

Avoid Pretext

Maintaining credibility is the key to victory. The cases are replete with attempts by public officials to outsmart the public and the courts by fabricating reasons for their conduct. Nothing dilutes the credibility of a witness more than being caught in a lie. The tragedy is that judges and juries will often infer a motive worse than it actually was. When circumstances prevent complete honesty about the reasons for an action, it is far better to give no explanation or a general one than a false one.

Be Open To Reasonable Compromise

Some cases involve non-negotiable matters of principle. Most do not. The trick is to have the wisdom to know the difference. However innocent a board member may feel, judges and juries are not omniscient. On a practical level, the truth is what the judge and jury say it is, based on the evidence permitted into the courtroom.

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* This section is adapted from D. Rubin, *School Board Member Liability Under Section 1983* (NSBA 1992).

Before trial, the school board's lawyers will have an opportunity to investigate all the evidence the other side proposes to introduce in court, so they can critically appraise the strengths and weaknesses of the case from the standpoint of what the court will hear, not just what the board believes to be true. Do not discourage candid discourse with the board's attorney. Righteous indignation does not win cases. Winning requires sufficient competent evidence—which may not exist in any given case. If it does not, a board and its members should consider the advice of their attorneys concerning possible settlement of the case out of court. Settlement should not be perceived as "giving in" or admission of wrongdoing; it can often be the most positive resolution of a case that a board and its members can hope to obtain and an effective means of limiting liability.

CONCLUSION

It is the board's responsibility to ensure prudent steps have been taken to protect the integrity of and further the goals of their district. Board members must know and recognize potential areas of liability and take steps to protect the district from complaints and lawsuits as well as public relations disasters. Policies must be clearly stated and shared with staff to ensure the consistency of the district's actions. The board and the staff must receive and fully participate in policy training sessions. If a complaint is made, the district must take control of the situation, performing thorough investigations, responding to complaints and taking appropriate corrective action. The district must work closely and cooperatively with a team of experts, including the insurance carrier, the district's counsel and auditors. Due diligence in all of these areas will avert many costly errors and help ensure that the most important topic of discussion by the board is the business of education, and not legal liability.

WAYS TO MINIMIZE LIABILITY

- ✓ Adopt and implement clearly stated policies in compliance with state and federal law.
- ✓ Pay special attention to adopting policies on controversial issues. Failing to adopt policies on sensitive topics only leads to more legal problems later.
- ✓ Work closely with the board's attorney when adopting, implementing, interpreting, reviewing and changing policies. Paying for advice from counsel early on will help assure policies and other board decisions are not weighed down with legal problems that will cost the district more in the end.
- ✓ Require training for everyone including board members, administrators and staff on school district policies. Having good policies helps avoid liability only when they are understood and followed by everyone in the school community.
- ✓ Gear training to the roles and responsibilities of those being trained. Training should include how to put policies into practice. Stress that ignoring district policies is not an option.
- ✓ Provide regular training by knowledgeable professionals.
- ✓ Require prompt and thorough investigation of all complaints. Take appropriate corrective action as necessary.
- ✓ Respect the chain of command. Allow administrators to do their jobs before taking action.
- ✓ Secure appropriate and comprehensive insurance coverage. Consult with a competent school attorney or risk management professional when purchasing insurance.

cont'd

- ✓ When a claim is received, notify the district's insurance carrier and attorney immediately. Cooperate with them.
- ✓ Choose battles carefully. Secure competent legal advice early about the risks and expense of litigation.
- ✓ Choose qualified trial counsel.
- ✓ Avoid pretext. Don't dilute the board's credibility by fabricating reasons for the conduct in question. It is better to give no explanation than a false one.
- ✓ Be open to compromise. Ask the district's attorney to provide a candid appraisal of the strengths and weaknesses of the district's case. Don't let righteous indignation preempt the board's consideration of possible settlement of the case out of court. Settlement may be the most effective way to limit liability.

NATIONAL SCHOOL BOARDS ASSOCIATION
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Americans with Disabilities Act: Its Impact on Public Schools (March 1993) by Nancy Fredman Krent, Scott S. Cairns, and Jean Arnold Dodge. This publication analyzes the key titles of the ADA applicable to public schools. Included are discussions of the law's anti-discrimination requirements in the areas of employment and state and local government services. The appendices reproduce relevant portions of the statute, implementing regulations and agency interpretive guidance. 120 pages. ISBN 0-88364-146-1 (List $25, National Affiliates and Council members $20). Order No. 06-142-1.

Child Abuse: Legal Issues for Schools (March 1994). This monograph addresses the legal issues schools face in responding to child abuse, including employee background checks, reporting requirements, appropriate training, interagency cooperation, investigation of school-based abuse, due process, insurance coverage, victim assistance and liability. The appendices contain applicable state and federal laws and numerous sample policies and forms. 198 pages. ISBN 0-88364-184-4 (List $25, National Affiliates and Council members $20). Order No. 06-148-1.

Desk Reference on Significant U.S. Supreme Court Decisions Affecting Public Schools (Revised Edition 2000). This desk reference provides attorneys and laymen alike with quick access to the name, citation and/or rule of virtually every U.S. Supreme Court case in which a public school district was a party and a substantive decision was rendered (however, it does not analyze the decision). It includes an extensive word index, table of cases with full parallel citations and table of constitutional and statutory provisions. 118 pages. ISBN 0-88364-227-1 (List $25, National Affiliates and Council members $20). Order No. 06-171-1.

Education Law Cases (October 2002). This reference book compiles summaries of selected education law cases from August 2001 through July 2002. Presented in a topical format, it includes cases from the U.S. Supreme Court, federal appellate and district courts and state supreme and appellate courts. Case summaries are grouped by court under broad topics such as employment, student rights, liability, and religion. It also contains a special section containing only U.S. Supreme Court cases that affect public education. Topical and alphabetical tables of cases are provided. ISBN 0-88364-260-3 (List $15, National Affiliate and Council members, $12) Order No. 06-188-1.

From the Ground Up: Legal Issues in School Construction (April 2002). As your school district continues to build, renovate and modernize school facilities, make sure you're prepared for any legal issues coming your way. Architect contracts. . . .bidding issues. . . .environmental issues. . . .just a few of the many important legal issues you need to be ready for. Don't let legal issues delay your planning and building progress. Order this valuable resource today! 196 pages. ISBN 0-88364-252-2 (List $40, National Affiliates and Council Members $32). Order No. 06-185-1.

Legal Handbook on School Athletics (March 1997). This monograph provides school attorneys, board members, administrators and athletic directors with an understanding of the various legal issues that affect school athletic programs. Discussion of the law is supplemented with practical advice. Topics include: discipline of athletes: due process considerations, eligibility rules protecting high school athletes, participation of private school and disabled students, drug testing, Title IX, public school sports and religion, injuries during physical education classes and extracurricular activities, spectator issues, student athletics and insurance issues, athletic personnel and volunteer issues. 120 pages. ISBN 0-88364-206-9 (List $35, National Affiliates and Council members $28). Order No. 06-160-1.

Legal Issues & Education Technology: A School Leader's Guide (September 2001). This publication focuses on preventive strategies school leaders need to avoid costly and disruptive litigation that may result from incautious implementation or administration of technology in schools. The contents reflect recent legislation and court decisions and are presented in an easy to read format. Topics include Internet filters, legal requirements for accessible Web design and ergonomically sound facilities, student and staff privacy rights,COPPA, CIPA, FERPA, and ADA compliance issues and updates, copyright, acceptable use policies, off-site data storage policies, commercial agreements with e-businesses, open-meeting "sunshine" laws, and more. 154 pages. ISBN 0-88364-247-6 (List $35, Council, Technology Leadership Network members and National Affiliate members $28). Order No. 03-150-10.

No Child Left Behind Handbook (October 2002). This publication includes materials presented at the Council's briefing on the No Child Left Behind Act in October, 2002. Resource documents cover timelines, notice requirements, policy development, frequently asked questions, testing and accountability mandates, school choice, personnel issues and miscellaneous requirements imposed under this massive federal education statute. ISBN 0-88364-263-8. (List $30, National Affiliate and Council members, $25) Order No. 06-190-1 or 06-190-W (electronic version).

Reasonable Accommodation of Disabled Employees: A Comprehensive Case Law Reference (February 1996) by Brian Shaw. This reference book provides brief summaries of over 200 cases deciding reasonable accommodation issues under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The summaries are arranged topically

addressing: 1) general issues such as standards, knowledge of disability, suggesting an accommodation, burden of proof, and good faith defense; 2) over 20 different types of accommodations; and 3) undue hardship issues. A detailed table of contents and table of cases provide easy access to school attorneys looking for case law to help answer their clients' accommodation questions. 95 pages. ISBN 0-88364-200-X (List $15, National Affiliates/ Council of School Attorneys price $12). Order No. 06-156-1.

Religion & Public Schools: Striking A Constitutional Balance (Revised edition, August 2001). This edition discusses the latest developments in the law, including the Supreme Court's decisions in *Milford, Mitchell, Santa Fe* and *Agostini.* This monograph is a compilation of articles written by Council members and focuses on the effect of the establishment and free exercise clauses of the first amendment and the constitutional issues surrounding accommodating employee religious beliefs, wearing of religious garb, curriculum content, school prayer/moment of silence, holiday observances, equal access, home schools and much more. 246 pages. ISBN 0-88364-244-1 (List $35, National Affiliates and Council members $28). Order No. 06-181-1.

Safe Schools, Safe Communities (September 2000). Emphasizing the need for cooperation to prevent and respond to violence at school, this book examines how schools and communities can work together to make our schools safe. Among the topics discussed are the need to balance school safety needs and the rights of individual students, how to deal with threats of violence, the role of the school attorney in response to violence, and how to work with the media in times of crisis. Also included are other helpful materials such as sample interagency agreements, a list of other resources on school safety, warning signs that should trigger school response and sample policies. 98 Pages. ISBN 0-88364-238-7 (List $25, National Affiliates and Council Members $20). Order No. 06-177-1.

A School Law Primer: Part I (Revised edition, January 2001). Created to meet the needs of the attorneys who serve public school districts and those of the school community at large, *A School Law Primer: Part I* is intended as a training manual to help you keep your clients out of court. Specifically, the *Primer* was designed to save hundreds of hours in research time, help when you have been called upon to do a presentation, and be a valuable resource for training new associates and clients. Each chapter consists of three main components - a presentation outline and case summaries, participant "notes pages," and a diskette containing Microsoft PowerPoint® slides that correspond to the outline. This revised edition features these subjects: Student Discipline, Students' Rights, Special Education, and Teacher Discipline. ISBN 0-88364-224-7 (List $400.00, National Affiliates and Council Members $320.00. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960). Order No. 06-169-1.

A School Law Primer: Part II (March 2000). Update your law library with the second part of this training tool. This school law training manual covers Employee Rights, Negligence, School Safety and Sexual Harassment. Each chapter consists of three main components — a presentation outline and case summaries; participant "notes pages;" and a diskette containing Microsoft Powerpoint® slides that correspond to the outline. ISBN 0-88364-234-4 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960). Order No. 06-175-1.

A School Law Primer: Part III (April 2002). This edition of the School Law Primer series features the following subjects: Religion, Discrimination, Board Authority and Curriculum Issues. Each chapter contains presentation outlines and case summaries, participant "notes pages" and ready made Power Point® slides available on a diskette or via the Internet. This approach was selected to help new school attorneys learn quickly the fundamental principles that will form their stock in trade as well as to save time for attorneys called upon to prepare and present school law training for school board members, administrators, staff or other school attorneys. ISBN 0-88364-255-7 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320. Purchase two editions of the Primer for $512, non member price $640, or all three editions for $768. Non member price $960). Order No. 06-186-1.

School Law in Review 2002 (April 2002). This digest of papers presented at the 2002 Annual School Law Seminar includes the following topics: students' rights, religion, environmental hazards for urban schools, high stakes testing, free speech, school employee misconduct and misuse of technology, diversity in higher education, student drug testing, FERPA and student record keeping, investment contracts, FLSA record keeping practice tips, ethics, Supreme Court and legislative updates, IEP development process, and school construction issues. ISBN 0-88364-254-9 (List $40, Council members - first copy free. National Affiliates and additional Council copies $32). Order No. 06-185-1.

School Reform: The Legal Challenges of Change (April 1996). This monograph is intended to assist school attorneys in their efforts to advise school boards on the legal issues that accompany various reform measures. Covering such topics as school finance, choice, site-based management, privatization, alternative schools, charter schools and tenure reform, the discussion ranges from constitutional dilemmas to statutory issues to labor relations implications. Review of the law is supplemented with practical advice. 150 pages. ISBN 0-88364-202-6 (List $30, National Affiliates and Council members $25). Order No. 06-158-1.

Selecting and Working with a School Attorney: A Guide for School Boards (April 1997). In today's world, getting good legal advice when problems arise and how to avoid problems in the first place is a must for school boards. This book shows school board members how to select and to work effectively with a school attorney. Topics include: historical development of the role of the school attorney, hiring in-house counsel v. an outside attorney, selection, recruitment and retention of legal counsel, ethical issues in school board representation, evaluation and termination of school district counsel, the school attorney as a preventive law practitioner, and how to work effectively with the school attorney. Also included in the appendices are sample policies, forms, agreements and checklists. 142 pages. ISBN 0-88364-209-3 (List $35, National Affiliates and Council members $28). Order No. 06-162-1.

Sexual Harassment by School Employees (March 2001). School leaders and school lawyers faced with the task of preventing and responding to allegations of sexual harassment by employees will find the information they need in this monograph. Covering harassment that occurs between employees and employee harassment of students, it discusses current federal case law, effective policy development, how to conduct internal investigations, training advice and resources and agency (OCR and EEOC) investigations. The appendices contain many useful documents including regulations, agency guidance, sample policies and checklists. 228 pages. ISBN 0-88364-237-9 (List $35, National Affiliates and Council members $28). Order No. 06-176-1.

Student-to-Student Sexual Harassment: A Legal Guide for Schools (Revised edition, March 2000). Addressing a complex legal and social issue, this monograph provides the school law practitioner and school leader with information on how to prevent, respond to, analyze and defend student to student harassment claims. In addition to discussing federal case law, it includes a section on policy development, advice on conducting investigation, tips for training, and analysis of the Office for Civil Rights guidelines and appendices containing OCR documents, sample policies and forms and helpful check lists. 192 pages. ISBN 0-88364-235-2 (List $35, National Affiliates and Council members $28). Order No. 06-166A-1.

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Termination of School Employees: Legal Issues and Techniques (April 1997). Disputes over employee termination are the most common legal problem faced by schools. In order to assist school attorneys and officials in handling these disputes, this monograph addresses the legal issues and suggests effective techniques associated with proper termination of school employees. Topics include: employee performance documentation, evaluation, remediation, settlement agreements, public employee speech and off duty conduct, termination of drug/alcohol abusers, legal issues in trying a misconduct case, due process, and employment at will. 316 pages. ISBN 0-88364-210-7 (List $35, National Affiliates and Council members $28). Order No. 06-163-1.

Understanding and Limiting School Board Member Liability (October 2002). This book, now in its fourth edition, serves as primer for both school board members and school attorneys on board member liability issues. Using layman's terms, this version expands beyond the focus of former editions on Section 1983 liability to include explanations of how our legal system works, board member liability under state tort law, legal defenses and immunities against liability and a special section on how to avoid and minimize board member liability. Each chapter is followed by checklists to help readers review and remember key points. 90 pages. ISBN 0-88364-261-1. (List $15, National Affiliate and Council members, $12) Order No. 06-187-1.

The 1999 IDEA Regulations: A Practical Analysis (July 1999). It is imperative that schools understand the special rules and requirements that they must follow in addressing the needs of students served under the Individuals with Disabilities Education Act (IDEA). This publication is a guide for all school professionals involved in special education to grasp the basic requirements and implications of the regulations issued by the U.S. Department of Education. Using an easy to follow format that tracks the regulations rule-by-rule, special education experts explain what you need to know and what you must do to comply with the provisions on a broad range of issues including public charter schools, graduation of special needs students, assessments, use of Medicaid and insurance, IEP requirements, services to children in private schools, procedural safeguards, and discipline of children with disabilities. 96 pages. ISBN 0-88364-225-5 (List $25, National Affiliates and Council members $20). Order No. 06-170-1.

2002 Advocacy Seminar Notebook (October 2002, Denver, Colorado). This loose-leaf notebook compiles materials presented at the Council's October, 2002 advocacy seminar. Topics include student discipline in a high-tech world, accommodations under the ADA and FMLA, preventing liability for sexual harassment, representing schools in autism cases, copyright basics, new liberty interest issues in employment, new ESEA requirements, nontraditional revenue sources for schools, ethics, and Supreme Court update. ISBN 0-88364-262-X (List $200, National Affiliate and Council members, $160). Order No. 06-189-1.

2001 Advocacy Seminar Notebook (October 2001, Alexandria, Virginia). This loose-leaf notebook is a compilation of the presentations given at the Council's October 2001 advocacy seminar. Topics include drawing the line separating church and state, constitutional rights of secondary school students, current issues in special education, current issues in employment discrimination, vouchers and school choice, Title I of the Elementary and Secondary Education Act of 1965, high-stakes testing; Americans with Disabilities Act, ethics and the school attorney, Children's Internet Protection Act, student discipline, federal issues and national trends, and inside the Supreme Court. 606 pages. ISBN 0-88364-250-6 (List $200, National Affiliates and Council members $160). Order No. 06-183-1.

2000 Advocacy Seminar Notebook (October 2000, Phoenix, Arizona). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 2000 advocacy seminar. Topics include responding to student threats, current issues of students with disabilities, FERPA, E-mail and access to public meetings and records, the latest on prayer in schools, Equal Access Act, legal considerations in measures to promote school safety, recent developments in hiring and retaining superintendents, responding to temporary restraining orders, high stakes testing, disciplining employees for off-campus conduct, private businesses and schools, race as a factor in student assignment, Cincinnati's alternative dispute resolution process, do not resuscitate orders and other issues related to medically fragile students, and the attorney-client privilege. 628 pages. ISBN 0-88364-241-7 (List $200, National Affiliates and Council members $160). Order No. 06-180-1.

A School Law Retreat 1999 (October 1999, Charleston, South Carolina). This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 1999 advocacy seminar. Topics include tuition vouchers, student drug testing, employee benefits, superintendent contracts and settlement agreements, peer sexual harassment, the Internet and use of e-mail, board member issues, linking teacher evaluation to student achievement, sexual orientation, student and employee issues, religion and the schools, voluntary desegregation, student-to-student sexual harassment claims under Title IX, student control and discipline, responding to threats of violence, the ethical use of technology in the practice of school law, and the Individuals with Disabilities Education Act (IDEA). 440 pages. ISBN 0-88364-288-X (List $200, National Affiliates and Council members $160). Order No. 06-172-1.

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about NSBA...

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through school board leadership. NSBA achieves its mission by representing the school board perspective before federal government agencies and with national organizations that affect education, and by providing vital information and services to state associations of school boards and local school boards throughout the nation.

NSBA advocates local school boards as the ultimate expression of grassroots democracy. NSBA supports the capacity of each school board—acting on behalf of and in close concert with the people of its community—to envision the future of education in its community, to establish a structure and environment that allow all students to reach their maximum potential, to provide accountability for the people of its community on performance in the schools, and to serve as the key community advocate for children and youth and their public schools.

Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,890 local school districts serving the nation's more than 47 million public school students. Virtually all school board members are elected; the rest are appointed by elected officials.

NSBA policy is determined by a 150-member Delegate Assembly of local school board members. The 25-member Board of Directors translates this policy into action. Programs and services are administered by the NSBA executive director and a 150-person staff. NSBA is located in metropolitan Washington, D.C.

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1997 - 1998	Gary R. Thune, North Dakota
1998 - 1999	Ann. L. Majestic, North Carolina
1999 - 2000	James T. Maatsch, Michigan
2000 - 2001	Martin Semple, Colorado
2001 - 2002	Cynthia Lutz Kelly, Kansas

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